VOLUME III

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1967

## No. 23

PATRICIA WALDRON, ETC., PETITIONER,

*vs.*

CITIES SERVICE CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1966
CERTIORARI GRANTED JANUARY 16, 1967

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## INDEX



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[fol. A]

# IN UNITED STATES DISTRICT COURT
# FOR THE SOUTHERN DISTRICT OF NEW YORK

Civ. 110-223

DOCKET ENTRIES

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| June 11—56 | Filed Complaint |
| Jun. 19—56 | Filed summons & return. Served all defts except Gulf Oil Corp on 6-12-56. Served deft Gulf Oil Corp. 6-15-56. |
| Jun. 27—56 | Filed Answer of Deft. Socony Mobil Oil Co, Inc. |
| Jun. 27—56 | Filed Notice of Taking Deposition of Pltf. |
| Jun. 29—56 | Filed Deft's The Texas Co. Notice of appearance. |
| Jun. 29—56 | Filed Deft. British Petroleum Co., Ltd. Notice of appearance. |
| Jun. 29—56 | Filed Notice of taking deposition of Pltf. |
| Jun. 29—56 | Filed Order extending time of Deft. Guld Oil Corp to answer to 9-30-56. Levet, J. |
| June 28—56 | Filed affdvt & show cause order—extend time of deft Socony Mobil Oil to answer to 10-30-56—Ret. 7-3-56. |
| June 28—56 | Filed affdvt & show cause order—extend time of deft. British Petr. Co. to answer to 10-30-56—Ret. 7-3-56. |

[fol. B]

| | |
|---|---|
| June 28—56 | Filed affdvt & show cause order—extend time of defts. Cities Service, Standard Oil Co. of Calif. & Standard Oil Co. (NJ) to answer to 10-30-56—Ret. 7-3-56. |
| July 2—56 | Filed notice of taking deposition of Pltf. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| July 3—56 | Filed Affdvt of Service & Deft's Notice of Appearance for The Texas Co. |
| July 6—56 | Filed affdvt. of S. M. Lane in opposition to motions to extend time to answer. |
| July 3—56 | Memo endorsed on show cause order filed 6-28-56. Time extended as indicated, see memo. Weinfeld, J. |
| July 11—56 | Filed order extending time for defts. to ans. etc. see order. Weinfeld, J. Mailed notice of entry. 7-12-56. |
| July 13—56 | Filed Deft's Cities Service Co. notice of appearance. |
| July 13—56 | Filed Deft's Cities Service Company appearance. |
| Aug. 13—56 | Filed Stip. & Order extending time to answer to 30 days after completion of taking of deposition of pltf. Waldron, Walsh, J. |
| Aug. 15—56 | Filed Stip. & Order substituting Paul Weiss Rifkind Wharton & Garrison & O'Brien and Park Holland, Jr. as attys. for deft. Cities Service, in place of atty. O'Brien— |
| Aug. 24—56 | Filed Notice of taking deposition of Pltf. |
| Aug. 24—56 | Filed Notice of appearance for deft. British Petroleum Co., Ltd. |
| Aug. 29—56 | Issued Additional summons. |
| Aug. 31—56 | Filed Pltf's Interrogs. |
| Sept. 20—56 | Filed Additional Summons & Return—Served Standard Oil Co. of Calif. on 9-5-56 |
| Aug. 20—56 | Filed affdvt & show cause Order—Vacate & set aside service upon deft Standard Oil Co. of Calif. & dismissing as to said deft.—ret. 9-25-56. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Oct. 9—56 | Filed Stip & Order adjourning motions of objection to interrogs to 10-18-56. McGohey, J. |
| Oct. 10—56 | Filed notice of filing appearance. |
| Oct. 10—56 | Filed notice of taking deposition of R. S. Nelson. |
| Oct. 2—56 | Filed affdvt & notice of motion to eliminate, strike out or modify certain interrogatories, etc.—ret. 10-18-56. |
| Oct. 17—56 | Filed Stip & Order adjourning motions of objection to interrogs to 11-1-56. Edelstein, J. |
| Sept. 25—56 | Filed Affdvt & Notice of motion to vacate service of process, etc. Ret. 10-25-56. |
| [fol. C] | |
| Nov. 16—56 | Filed notice of taking deposition of James A. Bently; James E. Zoes and Ray Carter. |
| Dec. 4—56 | Memo endorsed on motion filed 10-2-56—Marked off—Bicks, J. |
| Dec. 11—56 | Filed stip. & order modifying pltff's interrogs to Standard Oil Co. of Calif. Nos. 15, 16, etc.—Bicks, J. |
| Jan. 11—57 | Filed Answers to interrogatories by deft Standard Oil Co. of Cal. |
| Jan. 16—57 | Filed stip. & order adjourning deposition of J. A. Bentley to 4-15-57, etc.—Ryan, J. |
| Jan. 16—57 | Filed stip. & order adjourning deposition of J. E. Zoes to 4-16-57, etc., Ryan, J. |
| Jan. 21—57 | Filed Stip. & order adjourning deposition of Ray Carter to date as indicated. Weinfeld, J. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Jan. 31—57 | Filed stip. & order adjourning deposition of R. S. Nelson to 4-4-57, etc.—Weinfeld, J. |
| Feb. 1—57 | Filed stip. & order adjourning show cause order & supplemental motion to 2-14-57. Weinfeld, J. |
| Feb. 6—57 | Filed order—motion to modify subpoena as indicated; records indicated to be produced; exam. to commence 2-12-57, etc.—Weinfeld, J.—Mailed notice of entry 2-7-57. |
| Feb. 6—57 | Filed unsigned direct order. |
| Mar. 18—57 | Filed Opinion #23,336. Motions to dismiss for improper venue and to vacate purported service of process denied—So ordered—Dawson, J. Mailed notice of entry 3-18-57. |
| Mar. 19—57 | Filed transcript of record of proceedings of Feb. 14—57. |
| Mar. 19—57 | Filed affdvt. of J. F. Caskey. |
| Mar. 19—57 | Filed supplementary affdvt. of S. M. Lane. |
| Mar. 19—57 | Filed affdvt. of S. M. Lane. |
| Mar. 26—57 | Filed stip. & order adjourning deposition of Ray Carter to 6-6-57.—Noonan, J. |
| Mar. 28—57 | Filed transcript of record of proceedings of Feb. 14, 1957. |
| Mar. 28—57 | Filed stip. & order adjourning depositions of R. S. Nelson to 6-3-57—Noonan, J. |
| Apr. 2—57 | Filed stip. & order adjourning deposition of Jas A. Bentley to 6-4-67, etc.—Murphy, J. |
| Apr. 11—57 | Filed stip. & order substituting Cahill GR&O as attys for deft Standard Oil Co. of Calif. for Dwight RHK&C. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Apr. 15—57 | Filed stip. & order extending time of deft Standard Oil Co. of Calif. to answer until 30 days after completion of taking pltff's deposition, etc. Murphy, J. |
| [fol. D] 1957 | |
| May 21 | Filed stip. & order adjourning deposition of J. A. Bentley to 10-8-57, etc.—Cashin, J. |
| May 21 | Filed stip. & order adjourning deposition of J. E. Zoes to 10-9-57, etc.—Cashin, J. |
| May 21 | Filed stip. & order adjourning deposition of R. Carter to 10-10-57, etc.—Cashin, J. |
| May 22—57 | Filed stip. & order adjourning depositions of R. S. Nelson to 10-7-57, etc.—Cashin, J. |
| Oct. 2—57 | Filed stip. & order adjourning deposition of James A. Bently to 11-29-57—Noonan, J. |
| Oct. 2—57 | Filed stip. & order adjourning depositions of R. S. Nelson, et ano to 11-18-57—Noonan, J. |
| Oct. 2—57 | Filed stip. & order adjourning deposition of James E. Zoes to 11-20-57—Noonan, J. |
| Oct. 4—57 | Filed stip. & order adjourning deposition of Ray Carter to 11-21-57—Noonan, J. |
| Nov. 13—57 | Filed stip. & order adjourning deposition of James E. Zoes to 1-22-58—Kaufman, J. |
| Nov. 13—57 | Filed stip. & order adjourning deposition of James A. Bentley to 1-21-58—Kaufman, J. |
| Nov. 13—57 | Filed stip. & order adjourning deposition of Richard S. Nelson, etc. to 1-20-58—Kaufman, J. |
| Nov. 14—57 | Filed stip. & order adjourning deposition of Ray Carter to 1-23-57—Kaufman, J. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Jan. 17—58 | Filed stip. & order adjourning depositions of R. S. Nelson, et ano to 4-7-58—Sugarman, J. |
| Jan. 20—58 | Filed stip. & order adjourning deposition of James E. Zoes, et ano to 4-21-58—Sugarman, J. |
| Jan. 21—58 | Filed stip. & order adjourning deposition of Jas A. Bently to 4-14-58—Herlands, J. |
| Jan. 22—58 | Filed stip. & order adjourning deposition of Ray Carter to 4-28-58—Herlands, J. |
| Jan. 2—58 | Filed pltff's affdv't & notice of motion to terminate exam. and vacate notices—ret. 1-30-58. |
| Jan. 31—58 | Filed opposing affdvt of Standard (NJ) |
| Jan. 31—58 | Filed opposing affdvt of Socony Mobil Oil. |
| Jan. 31—58 [fol. E] | Filed opposing affdvt of Standard (Cal.) |
| Jan. 28—58 | Filed opposing affdvt of Gulf Oil. |
| Jan. 31—58 | Filed opposing affdvt of British Petroleum. |
| Jan. 31—58 | Filed opposing affdvt of Texas Co. |
| Jan. 31—58 | Filed opposing affdvt of Cities Service. |
| Jan. 30—58 | Memo endorsed on motion filed 1-2-58—Denied in all respects. Settle order as indicated—Herlands, J. |
| Feb. 13—58 | Filed unsigned counter-order. |
| Feb. 13—58 | Filed order—pltff's motion to terminate exam. etc. denied and taking of testimony of pltff Waldron to continue as indicated, etc.—Herlands, J. Mailed notice of entry 2-14-58. (See memo endorsed re: retention of certain papers, etc.) |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Feb. 13—58 | Filed pltff's memo of law (item 2 of memo on order of 2-13-58). |
| Feb. 13—58 | Filed Items 3, 4, 5, 6 & 7 in memo of 2-13-58. (Letters, etc.) |
| Mar. 10—58 | Filed stip. & order—Exam. of pltff Waldron by Standard (NJ) to begin 4-7-58—Dimock, J. |
| Mar. 18—58 | Filed stip. & order adjourning deposition of James A. Bentley to date in conformity with order Herlands, J.—2-11-58—Noonan, J. |
| Mar. 18—58 | Filed stip. & order adjourning deposition of Richard S. Nelson to date in conformity with order Herlands, J., 2-11-58—Noonan, J. |
| Mar. 18—58 | Filed stip. & order adjourning deposition of Ray Carter to date in conformity with order Herlands, J., 2-11-58—Noonan, J. |
| Mar. 18—58 | Filed stip. & order adjourning deposition of James E. Zoes to date in conformity with order Herlands, J., 2-11-58—Noonan, J. |
| Mar. 29—58 | Filed stip. & order adjng deposition of R. S. Nelson to date as indicated—Noonan, J. |
| Apr. 7—58 | Filed stip. & order adjourning deposition program set forth in order of 2-13-58 to begin 9-15-58—Bryan, J. |
| May 16—58 | Filed affdvt & notice of motion by pltffs' to revive action, etc.—ret. 5-20-58. |
| Sept. 2—58 | Filed affdvt & notice of motion—Relieve pltff of stip. re: deposition—ret. 9-8-58. |
| Sept. 8—58 | Filed stip. and order of pltff's motion dated 8-28-58 is withdrawn. Edelstein, J. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Sep. 8—58 | Memo endorsed on motion filed 9-2-58—Withdrawn—So ordered—Edelstein, J. |
| Sept. 16—58 | Filed stip. & order adjourning deposition program set forth in order of 2-13-58 to begin 9-16-58. Weinfeld, J. |
| Nov. 6—58 | Filed opposing affdvt to application to extend pltff's time. |
| [fol. F] | |
| Nov. 6—58 | Filed affdvt of D. H. Buchanan, Jr., M.D. |
| Nov. 6—58 | Filed Affdvt & Order to show cause to extend time, etc. Ret. 11-6-58. (added in court). Memo endorsed on reverse dated 11-6-58. Pltf is directed to appear for exam as direction on or before 11-12-58 at time & place to be agreed on. So ordered. Kaufman, J. |
| Nov. 10—58 | Filed copy of order of 11-6-58 w/notice of entry. |
| Jan. 14—59 | Filed stip. & order adjourning deposition to 2-24-59—McGohey, J. |
| Feb. 4—59 | Filed stip. & order substituting atty for deft. Gulf Oil Corp.—Clerk. |
| Mar. 4—59 | Filed stip. & order adjourning depositions to begin 4-6-59—Edelstein, J. |
| Apr. 6—59 | Filed stip. & order adjourning depositions to 5-6-59—Palmieri, J. |
| May 1—59 | Filed order referring action to Judge Herlands for all purposes—Ryan, Ch.J. Mailed notice of entry 5-4-59. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| May 6—59 | Filed letter from Kissam & Halpin as co-counsel for Texas Co. |
| May 5—59 | Filed stip. & order deposition program to begin 5-20-59—Levet, J. |
| May 7—59 | Filed affdvt & notice of motion—dismiss claim as to Gulf Oil Corp.—ret. 5-12-59. |
| May 12—59 | Filed Notice of change of firm name—attys for Socony Mobil Oil. |
| May 12—59 | Memo endorsed on motion filed 5-7-59—Referred to Judge Herlands—Levet, J. Consent order dismissing claim as to deft Gulf Oil Corp.—Herlands, J. attached. |
| May 27—59 | Filed stip. & order re: examin. of pltff. adjourned to 9-9-59. Edelstein, J. |
| June 2—59 | Filed transcript of record of proceedings of 5-12-59. |
| July 17—59 | Filed stip. & order adjourning examin. of pltff. to 9-21-59.—Dawson, J. |
| Sept. 21—59 | Filed stip. & order adjourning examin. of pltff. to 10-26-59. Sugarman, J. |
| Dec. 8—59 | Filed stip. & order directing continuance of deposition program to 1/11/60—Sugarman, J. |
| Dec. 4—59 | Filed stip. & order adjourning taking of deposition of Richard N. Nelson to 1/11/60—Herlands, J. |
| Jan. 13—60 | Filed stip. & order continuing deposition program set forth in order of 12/13/58 scheduled to continue with deposition of Richard S. Nelson to 1/18/60—McGohey, J. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Apr. 15—60 | Filed notice of appearance of Sullivan & Cromwell as attorneys for Standard Oil Company (New Jersey) |
| Apr. 20—60 | Before Herlands, J.<br>Pre-trial conference held—Motion for summary judgment adjourned to May 9, 1960 at 10:30 A.M. in Room 706 |
| [fol. G] | |
| Apr. 22—60 | Filed consent & order substituting Amzy B. Steed in place of Edmund Burke, Jr. as attorney for deft. Texaco Inc. (sued as the Texas Co.) |
| June 27—60 | Filed transcript of record of proceedings of April 20, 1960.—& May 9, 1960 |
| Sept. 12—60 | Filed stip adjourning taking of deposition by deft Cities Service Co from 9-13-60 to 10-11-60. |
| Dec. 9—60 | Filed consent stip. & order that deposition of James A. Bentley shall continue 1-30-61. —Dimock, J. |
| Jan. 18—61 | Filed stip. & order adjourning deposition program until 4-17-61.—Edelstein, J. |
| Mar. 30—61 | Filed memorandum Opinion #26,787—Motion of deft. Cities Service Co. for Summary judgment is adjourned pending completion of such pre-trial proceedings as may hereafter be appropriately conducted by pltff. The court will confer with counsel with respect to the settlement of an order in accordance with the foregoing views.—Herlands, J.—Mailed notices |
| Mar. 30—61 | Filed affdvt. & notice of motion to fix hearing—ret. before Herlands, J. 4-25-61. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Mar. 30—61 | Filed affdvt. of Samuel M. Lane in opposition to motion for summary judgment. |
| Mar. 30—61 | Filed supplemental affdvt. of George H. Hill, Jr. on behalf of Cities Service Co. |
| Mar. 30—61 | Filed affdvt. in opposition to motion for summary judgment—(Gerald B. Waldron) |
| Mar. 30—61 | Filed stenographer's minutes of hearing of 4-20-60. |
| Apr. 14—61 | Filed consent stip. re: deposition of James A. Bentley shall begin 6-19-61. |
| May 4—61 | Filed order adjourning motion dated 4-8-60 pending completion of an examin. of deft. Cities Service as indicated—Herlands, J. —mailed notice |
| Oct. 24—61 | Filed consent stip. & order of substitution of attorneys for deft. Texas Co.—Clerk. |
| Oct. 27—61 | Filed deft. (Texas Co) notice of entry of stip. & consent substituting attys. true copy attached. |
| Nov. 3—61 | Filed stip. & order re: continuation with the deposition of James A. Bentley on 11-9-61. —Herlands, J. |
| Dec. 13—61 | Filed stip. & order re: continuation with the deposition of James A. Bentley on 12-18-61 & 12-19-61, etc.—Palmieri, J. |
| Feb. 20—62 | Filed stip & order re: continue with the deposition of James E. Zoes on 2-26-62— Herlands, J. |
| Apr. 16—62 | Filed stip & order modifing order of 2-13-62 —re: deposition as indicated. Herlands, J. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Apr. 19—62 | Filed Pltff's affdvt & notice of motion to modify stay of discovery proceedings ret. 4-30-62 Before Herlands, J. At 10:30 A.M. |
| Apr. 20—62 | Filed deft. (Socony Mobil Oil Co) notice to take deposition of Addison Brown, a witness. |
| [fol. H] | |
| May 1—62 | Filed stip that pltff's motion scheduled for 4-30-62 is adjourned until 5-7-62 at 10:30 A.M. or at such other time and place as the Court may fix for the said hearing. |
| May 18—62 | Filed affdvt of Amzy B Steed |
| May 18—62 | Filed affdvt of James O. Sullivan |
| May 18—62 | Filed order, that James O Sullivan, is permitted to argue or try this cause in whole or in part as counsel Or advocate for said deft Texaco Inc. (sued herein as the Texas Co.). Herlands, J. m.n. |
| May 29—62 | Filed notice that James O Sullivan is authorized to sign papers, and to receive or accept the service of papers, on behalf of said deft Texaco Inc. |
| Jun. 1—62 | Filed stip & order, pltff to submit proposed amended complaint before 6-15-62; before 6-30-62 the defts will indicate to the pltff whether or not they intend to oppose a motion to amend the original complaint as proposed etc.; 7-31-62 pltff shall move to amend the complaint, shall make such motion Ret.; 9-24-62 etc; any papers in opposition to such motion shall be served no less than fourteen days before the return date. pltff's reply papers shall be served no less than four days before the return |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| | day of said motion; defts except cities service Co shall have 30 days after entry of an order on pltff's motion to amend with respect to the complaint or amended complaint; the time of deft Cities Service to answer with respect to the complaint or amended complaint is extended 30 days following the determination by the Court. of deft Cities Service motion for summary Judgment, or until the date set forth in this stip for the answers or motion of all other defts. whichever date shall be later. —Herlands, J. |
| July 6—62 | Filed stip. & order adjourning examin. of Cities Service to 9-10-62—Palmieri, J. |
| Sept. 7—62 | Filed stip. and order adjourning pltffs. exam. of Cities Service to 10/10/62 Cooper, J. |
| Oct. 16—62 | Filed stip. & order that memorandum of Mr. W. Alton Jones dated 2-19-54—information contained therein shall not be disclosed to any person other than to the Court—etc.—Herlands, J. |
| Nov. 8—62 | Filed one envelope containing—1 letter to Herlands, J. two pages, 3 page letter to Hon. Dean Rust, Deposition of Cities Service, and Note to Parkhurst—signed James B Grant—to be *impounded.* in Rm. 602. |
| Nov. 13, 62 | Filed transcript of record of proceedings for 11/7/62. |
| Nov. 13, 62 | Filed order (unsigned) Documents relating to Iranian Oil Consortium to be held undisclosed to any person other than parties indicated or to be sealed. Scope of examination of G. H. Hill to be limited, etc. |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Nov. 13, 62 | Filed order (unsigned) (counter proposed) |
| Nov. 13, 62 | Filed affdvt. of Edward N. Costikyan. |
| [fol. I] | |
| Nov. 7, 62 | Before Herlands, J., Hearing held. |
| Nov. 13, 62 | Hearing held, Impounded envelope of 11/8/62 now in possession of the Clerk. |
| Nov. 21—62 | Filed pltff's affdvt & notice of motion to produce. ret 12-3-62—before Herlands J |
| Nov. 21—62 | Filed pltff's summary of Facts in support of application for Further Document Production by Cities Service. |
| Dec. 4, 62 | Filed affdvt. in opposition to pltffs. motion for discovery, etc. of Edw. N. Costikyan. |
| Dec. 4—62 | Filed memorandum of defts Socony, Socal, Jersey and Texaco in connection with pending discovery proceedings. |
| Dec. 5—62 | Filed memo endorsed on motion filed 11-21-62—Motion denied after argument. See official minutes of 12-5-62. So ordered—Herlands, J.—mailed notice 12-6-62 |
| Dec. 13—62 | Filed order—subject to the provisions of paragraphs 2 through 5 below, no person shall disclose documents or testimony relating to the Iranian Oil Consortium produced or given by or on behalf of deft. Cities Service to any person other than the parties, etc.—examin. of deft. Cities Service by George H. Hill, Jr. shall be resumed on 12-17-62 and said examin. shall be conducted in accordance with the order dated 5-3-61 except as said order is modified by the present order of this Court—Herlands, J.—(dated 12-13-62)—mailed notices |

| DATE | PROCEEDINGS |
|---|---|
| Dec. 19—62 | Filed stip. & order, that a discontinuance be entered within (30) days of the date hereof and that a compromise order of this Court or any other Court of Competent Jurisdiction be filed therewith.—Tyler, J. |
| Jan. 15—63 | Filed transcript of record of proceedings of 12-5-62 |
| Jan. 28—63 | Filed transcript of record of proceedings of 11-7-62 & 11-13-62 |
| Mar. 6—63 | Filed transcript of record of proceedings of 2-8-63. |
| Apr. 22—63 | Filed memorandum decision—The court sustains all of the objections interposed in behalf of cities Service Co., upon taking of the deposition of George H. Hill, Jr. on Feb. 27, 1963—So ordered.—Herlands, J. m/n |
| May 8—63 | Filed Stip and order substituting attys for deft Socony Mobile Oil Co Inc. Herlands, J. |
| May 9—63 | Filed affdvt and notice of motion for discovery, returnable before Judge Herlands on 5-20-63 |
| May 23—63 | Filed affdvt opposing pltf's motion for further discovery etc |
| May 27—63 | Motion held (Hearing) All pending motions and applications—Reserved.—Herlands—J. |
| June 25—63 | Filed transcript of record of proceedings of May 27 1963 |
| July 12—63 | Filed Amended COMPLAINT |

| DATE | PROCEEDINGS |
|---|---|
| July 19—63 | Filed Stip. and order extending time of defts to answer to amended complaint to 10-15-63 MacMahon, J. |
| July 30—63 | Filed Stip. and Order that if pending motion for summary judgment is denied—deft Cities Service shall have 30 days to answer etc. Cooper, J. |
| Aug. 20—63 | Filed pltf's memorandum of facts opposing Cities Service motion for summary judgment |
| Sept. 18—63 | Filed deft Cities Service reply memorandum |
| Oct. 14—63 | Filed stip and order extending time of defts to answer etc. to 11-1-63 Cooper, J. |
| Nov. 1—63 | Filed DOCUMENTS Vol. 1—Official States & Communications |
| Nov. 1—63 | Filed DOCUMENTS VOL. II—Exhibits 1 to 145 |
| Nov. 1—63 | Filed DOCUMENTS Vol. III—Exhibits 145 to 1207 |
| Nov. 1—63 | Filed Memorandum of Points & Authorities supporting defts' motion to dismiss etc. |
| Nov. 1—63 | Filed defts British Petroleum Co. Ltd. et al. motion for pre-trial order etc. |
| Nov. 1—63 | Filed deft British Petroleum Co. Ltd's notice re motions |
| Nov. 1—63 | Filed defts' British Petroleum Co's motion to dismiss etc. |
| Nov. 1—63 | Filed defts' memorandum of law supporting motion for pre-trial order etc. |
| Nov. 7—63 | Filed Defts British Petroleum Co & Cities Service Co's affdvt & Notice of Motion to compel signature of deposition of James A Bentley |

| DATE | PROCEEDINGS |
|---|---|
| Nov. 7—63 | Filed deft's supporting memorandum |
| Dec. 5—63 | Filed transcript of proceedings of Nov. 8 1963 |
| Jan. 9—64 | Filed notice of change of firm name for deft. Socony Mobil Oil Co. Inc. |
| [fol. J] | |
| Mar. 16—64 | Filed pltf's statement under Rule 9(g) (Memorandum of points and authorities in opposition to defts' motion to dismiss etc. |
| Mar. 16—64 | Filed pltf's affdvt of service (by mail) of above memorandum |
| Apr. 16—64 | Filed deft's reply memorandum in support of motion to dismiss etc. |
| Apr. 16—64 | Filed Document Boon—Vol. IV—Apr. 16 1964 Supplement (re deft's motion to dismiss etc) |
| Apr. 16—64 | Filed "References in Plaintiff's Brief—pages 13-17) (re deft's motion to dismiss, etc.) |
| May 11—64 | Before Herlands, J.—Argument of motions held & concluded—Decision Reserved. |
| May 22—64 | Filed OPINION #29990. The responsibility rests upon pltff to set forth in an affdvt. any and all specific facts and evidentiary data constituting the concrete particulars evidencing its "business or property" and the direct and primary injury sustained by said business or property as a result of the alleged acts of deft. This memorandum shall constitute an order. Herlands, J. |
| June 8—64 | Filed a Letter dtd. 6-5-64 to the Clerk of the Court—Re: counsel for deft. (Texaco) |
| June 23—64 | Filed Opinion #30096—The motion of Cities Service for summary judgment will |

| DATE | PROCEEDINGS |
|---|---|
| | be adjourned pending the completion of such discovery proceedings—The Court will confer with counsel on 6-30-64—10:30 a.m. for the purposes indicated—Herlands, J. |
| July 1—64 | Filed memorandum of Judge Herlands indicating correction on opinion #30096 filed 6-23-64—"defendant" on the first to second lines of the 3rd paragraph on page 35 should read "person"—Herlands, J. |
| July 10—64 | Filed order—Motion for summary judgment is adjourned pending completion of the exam. of deft. Cities Service Co by pltff. —Cross motion for discovery is granted as indicated etc—Deft. Cities Serv. Co produce to pltff. ten days in advance of exam. copies of all documents which relate to the subject upon which deft is to be exam.—within 30 days following the conclusion of said exam. pltff. & deft. Cities Serv. may submit to the Court any of such documents etc for final consideration of the pending motion—Herlands, J. m/n |
| Aug. 6—64 | Filed transcript of record of proceedings of May 11, 1964. |
| Aug. 7—64 | Filed stip & order—Pltff. to serve opposition papers to motion by 10-9-64—Defts. to serve replies by 11-2-64—Oral argument to be held before Judge Herlands at 10:00 a.m. on 11-9-64—Herlands, J. |
| Sep. 16—64 | Filed pltff's notice of motion pursuant to Rule 56(f) for production of documents & oral depositions. Ret. before Herlands, J. —Time & place to be fixed by Court. |

| DATE | PROCEEDINGS |
|---|---|
| Sep. 16—64 | Filed affdvt of Samuel M. Lane in opposition to Cities Service's motion for summary judgment and in support of pltff's motion for additional discovery. |
| Sep. 16—64 | Filed deft's (Cities Serv. Co.) submission in support of motion for summary judgt. |
| Sep. 16—64 | Filed one folder containing depositions. |
| Sep. 16—64 | Filed deposition of Burl S. Watson. m/n |
| Sep. 16—64 | Filed deposition of Alfred Putnam Frame. m/n |
| Sep. 16—64 | Filed deposition of Edgar Heston. m/n |
| Sep. 16—64 | Filed pltff's exhibits marked for identification in depositions of Watson, Frame and Heston. |
| Sep. 30—64 | Filed OPINION #30430. Fixing schedule for further discovery and for defts. Cities Service Co. motion for summary judgment. Papers on summary judgment to be filed before 11/2/64. So ordered. Herlands, J. mn 10/1/64. |
| Oct. 13—64 | Filed pltff's affdvt in opposition to deft's motion to strike amended complaint. |
| Oct. 13—64 | Filed pltffs' memorandum of law in opposition to defts' motion to strike etc. |
| Oct. 16—64 | Filed memorandum of defts' (other than Cities Service Co) in opposition to pltff's motion for discovery. |
| Oct. 16—64 | Filed statement of Milton Pollack. |
| Oct. 19—64 | Filed affdvt of Simon H. Rifkind in support of motion for summary judgment & in opposition to pltff's cross-motion for additional discovery. |

| DATE | PROCEEDINGS |
|---|---|
| Nov. 4—64 | Filed affdvt of Simon H. Rifkind Re: motion for summary judgmt. |
| Nov. 5—64 | Filed stip & order Re: motion pursuant to Rules 12(f) & 16 FRCP be disposed of as indicated—Herlands, J. |
| [fol. K] | |
| Nov. 4—64 | Filed pltffs' comments on the deposition of Messrs. Frame, Watson and Heston and the documents produced thus far by Cities. |
| Nov. 4—64 | Filed pltffs' memorandum of Law in support of motion for further discovery. |
| Nov. 4—64 | Filed affdvt of Alice Scott of service of the memorandum in support of pltffs' motion. |
| Nov. 6—64 | Filed stip & order extending deft's (British Petroleum Co Ltd) time to answer amended complaint to 10 days after the entry of the Court's order on deft's motion to strike etc—Herlands, J. |
| Nov. 5—64 | Filed pltff's reply to Cities Service's submission in support of its motion. |
| Nov. 10—64 | Filed order—All proceedings stayed until further order except a motion in accordance with Rule 25(a) FRCP.—Herlands, J. m/n |
| Nov. 24—64 | Filed letter dated 11-16-64 from Paul B. Wells Re: communications to deft. Texaco Inc. |
| Jan. 26—65 | Filed petitioner's (Patricia Waldron) affdvt & notice of motion to substitute executrix —Ret. before Herlands, J. at a time & place to be determined by Court. |

| DATE | PROCEEDINGS |
|---|---|
| Jan. 26—65 | Filed petitioner's memorandum in support of motion for substitution. |
| Jan. 29—65 | Filed deft's (Cities Service Co) affdvt & notice of motion for summary judgment—Ret. before Herlands, J. time to be fixed. |
| Jan. 29—65 | Filed memorandum in support of motion for summary judgment dismissing complaint against deft. Cities Service Co. |
| Feb. 3—65 | Filed pltff's notice of cross-motion for discovery—Ret. before Herlands, J. time to be fixed. |
| Feb. 5—65 | Filed memorandum of defts. on motion for substitution |
| Feb. 15—65 | Filed Opinion #30869 deferring determination of the issue relating to survivorship of claim for treble damages and atty's fees. Herlands, J. |
| Mar. 11—65 | Filed stip & order—The signing of the depositions indicated taken by pltff. is waived, and the depositions may be used as fully as though signed—Herlands, J. |
| Sep. 8—65 | Filed OPINION #31,600—Deft's (Cities motion for summary judgment dismissing the complaint as to it is hereby granted. Pltff's motion for further discovery under Rule 56(f) is hereby denied. So Ordered—Herlands, J. (Mailed notices on 9-9-65) |
| Sep. 10—65 | Filed transcript of record of proceedings of Feb. 9, 1965. |
| Sep. 13—65 | Filed notice of change of address of pltff's atty. |
| Sep. 13—65 | Filed JUDGMENT (on motion for summary judgment) Pltff's complaint against |

| DATE | PROCEEDINGS |
|---|---|
| | the deft. Cities Service Co is dismissed on the merits. Deft. recover from pltff. Patricia Waldron its costs of this action—Herlands, J.—Judgment Entered—Clerk (Entered and mailed notices on 9-15-65) |
| Sep. 15—65 | Filed notice of entry & copy of Judgment entered against deft. Cities Service Co. |
| Oct. 11—65 | Filed Bond in sum of $250. Fidelity & Deposit Co. of Md. undertaking appeal costs. |
| Oct. 11—65 | Filed pltff's Notice of Appeal—Mailed notices to Paul, Weiss, Rifkind, Wharton & Garrison, Milton Pollack, Nixon Mudge Rose Guthrie & Allexander, Donovan, Leisure, Newton & Irvine, Cahill, Gordon Reindel & Ohl, Sullivan & Cromwell and James O. Sullivan. |
| Oct. 22—65 | Filed pltff's notice of objections to proposed Bill of Costs. |
| Oct. 22—65 | Filed Bill of Costs taxed in the sum of $8,630.74 and added as Judgment #67,559. |
| Nov. 5—65 | Filed Supersedeas bond undertaking for costs on appeal. |
| Nov. 22—65 | Filed deposition of Gerald B. Waldron (35 vols. pages 1 to 3668) |
| Nov. 22—65 | Filed deposition of Gerald B. Waldron (59 vols. pages 3668 to 10190a) |
| Nov. 22—65 | Filed deposition of Richard S. Nelson (32 vols. pages 1 to 2899) |
| Nov. 22—65 | Filed hearing on motion (pages 1 to 20) May 3, 1961 |
| Nov. 22—65 | Filed deposition of James A. Bentley (9 vols. pages 1 to 3873a) |

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Nov. 22—65 | Filed deposition of James E. Zoes (5 vols. pages 1 to 830a) |
| [fol. L] | |
| Nov. 22—65 | Filed 1 volume of continued deposition of Gerald B. Waldron (pages 10,191 to 10259a) |
| Nov. 22—65 | Filed deposition of Addison Brown (pages 1 to 120) |
| Nov. 22—65 | Filed deposition of George H. Hill, Jr. (pages 1 to 650a) |
| Nov. 22—65 | Filed deposition of Alfred Putnam Frame —(pages 1 to 178 and 1 to 293) |
| Nov. 22—65 | Filed deposition of Burl S. Watson (pages 1 to 598) |
| Nov. 22—65 | Filed deposition of J. Edgar Heston (pages 1 to 212) |
| Nov. 19—65 | Filed stip & order that a printed copy of depositions of Gerald Waldron, Richard S. Nelson, James A. Bentley, James E. Zoes & Addison Brown pages 1 to 9836 shall be filed in this action non pro tunc & shall be included as part of original papers in the record on appeal. Herlands, J. |
| Nov. 22—65 | Filed stipulation as to what the record on appeal shall constitute. |

[fol. O]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Case Number Civ. 110-223

---

PATRICIA WALDRON, as executrix of the last will and testament of GERALD B. WALDRON, deceased, Plaintiff-Appellant,

—against—

CITIES SERVICE Co., Defendant-Appellee.

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TRUE EXTRACT OF DOCKET ENTRIES

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| June 28—56 | Filed Affidavit and Show Cause Order—extend time of defendant Socony Mobil Oil to answer to 10-30-56—Ret. 7-3-56 |
| June 28—56 | Filed Affidavit and Show Cause Order—extend time of defendants Cities Service, Standard Oil Co. of California and Standard Oil Co. (NJ) to answer to 10-30-56—Ret. 7-3-56 |
| Nov. 5—64 | Filed plaintiff's reply to Cities Service's submission in support of its motion. |
| Mar. 29—66 | Filed report on Iranian Petroleum situation. Exhibit CS-119 |
| Mar. 29—66 | Filed one envelope containing plaintiff's Exhibit CS-40 |
| Mar. 29—66 | Filed stip.—exhibits, and affidavit indicated are hereby designated as comprising a supplement to the record on appeal. |

[fol. P]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
Case Number 110-223

---

PATRICIA WALDRON, as executrix of the last will and testament of GERALD B. WALDRON, deceased, Plaintiff-Appellant,

—against—

CITIES SERVICE Co., Defendant-Appellee.

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TRUE EXTRACT OF DOCKET ENTRIES

| DATE | FILINGS—PROCEEDINGS |
|---|---|
| Dec. 13—62 | Filed order—subject to the provisions of paragraphs 2 through 5 below, no person shall disclose documents or testimony relating to the Iranian Oil Consortium produced or given by or on behalf of deft. Cities Service to any person other than the parties, etc.—exam. of deft. Cities Service by George H. Hill, Jr. shall be resumed on 12-17-62 and said examin. shall be conducted in accordance with the order dated 5-3-61 except as said order is modified by the present order of this Court—Herlands, J.—(dated 12-13-62)—mailed notices. |

[File endorsement omitted]

[fol. 11475]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 110-223

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GERALD B. WALDRON, individually and doing business as CONSOLIDATED BROKERAGE, Plaintiff,

vs.

BRITISH PETROLEUM CO. LTD., CITIES SERVICE CO., SOCONY MOBIL OIL CO. INC., STANDARD OIL CO. OF CALIFORNIA, STANDARD OIL COMPANY (NEW JERSEY), THE TEXAS COMPANY, Defendants.

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**Transcript of Hearing—New York, April 20, 1960**

10.30 o'clock a.m.

Before: Hon. William B. Herlands, District Judge.

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[fol. 11476] APPEARANCES:

Casey, Lane & Mittendorf, Esqs., Attorneys for Plaintiff; Samuel M. Lane, Esq., and Robert P. Beshar, Esq., of Counsel.

Sullivan & Cromwell, Esqs., Attorneys for Standard Oil Co. (New Jersey); Roy H. Steyer, Esq., and Hamilton F. Potter, Jr. Esq., of Counsel.

Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., Attorneys for Cities Service Co.; Simon H. Rifkind, Esq., and Edward N. Costikyan, Esq., of Counsel.

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for Socony Mobil Oil Co.; William Rogers, Esq., of Counsel,

—and—

Dorr, Hand, Whittaker & Watson, Esqs., Attorneys for Socony Mobil Oil Co.; Goldthwaite H. Dorr, Esq., and Robert Thornton, Esq., of Counsel.

Cahill, Gordon, Reindel & Ohl, Esqs., Attorneys for Standard Oil Co. of California; William N. Sayre, Esq., of Counsel.

Kissam & Halpin, Esqs., Attorneys for The Texas Company; Leo T. Kissam, Esq., P. Richard Mercurio, Esq., and Amzy B. Steed, Esq., of Counsel.

Milton Pollack, Esq., Attorney for British Petroleum Co. Ltd.

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[fol. 11477]

DISCUSSION RE FIXING DATE TO HEAR ARGUMENT ON MOTION FOR SUMMARY JUDGMENT

Mr. Rifkind: May it please your Honor, the nature of this morning's application is rather simple and really concerns only two parties: the plaintiff in the case of Waldron against British Petroleum, represented by Mr. Lane and Mr. Beshar, and ourselves appearing for Cities Service. I must confess to you that I am vastly flattered that on this simple application such a distinguished bar should be assembled to hear me make this argument—the only object of my argument being that I would like to fix a date, if your Honor finds it convenient to do so, on which you can hear argument on this motion for summary judgment.

I may say to your Honor that the motion will take more than the usual time to argue. I would not be surprised if the better part of a day were not devoted to its exposition.

On the other hand, if it should be successful, it will save a vast amount of time and a vast amount of money.

Be that as it may, the reason for this unusual mode of application is that many counsel representing other defen-

dants have expressed a desire to be present at least during [fol. 11478] the argument, for whatever bearing it may have upon their cases, and therefore have asked that some consideration be given as well to their convenience in the selection of a date. Being a reasonable fellow, as I hope your Honor will take judicial notice of, I am willing to accommodate my own convenience to them to some degree, but essentially I think it is a matter of your Honor's calendar to set a date most convenient to all.

So far as I am concerned, if your Honor is interested in our own wishes in the matter, any time during the first week of May would be satisfactory. The reason that I say the first week of May is that out of deference to the fact that Mr. Dean, who represents Standard Oil of New Jersey in this case, is out of the country and won't be back until the latter part of the month, and he has expressed a desire to be present. I am therefore saying the first week of May.

I hope your Honor won't make it beyond the first week of May because after that I have an obligation to perform which is of a confidential character, but I would be glad to disclose it to your Honor if your Honor is interested. If we do not have it during the first week of May it would [fol. 11479] involve a very long delay which I really think would be unwarranted.

Mr. Lane: May I be heard just briefly, your Honor?

The Court: Yes, Mr. Lane.

Mr. Lane: It seems to me that as you contemplate this motion which is brought under Rule 56 for summary judgment in an antitrust case, in which the defendant has not answered yet and in which the plaintiff has, from the very outset, been stayed from any discovery, inspection or deposition, it might devolve into really two arguments rather than the one which Judge Rifkind indicates; in other words, I think he in his own mind is considering that on this adjourned date which your Honor fixes we will be arguing the motion on the merits. I suggest that in the particular circumstances of this case the plaintiff would first proceed

under Rule 56(f) by demonstrating to the court that the facts by which this conspiracy may be proved would be in the possession of the defendants, not only Cities Service but the other defendants, and that we would not be prepared to meet this on the merits until we have had an opportunity for discovery and inspection and the taking of [fol. 11480] depositions.

If we confine ourselves to that on the adjourned date I think the argument would be fairly brief because the demonstration for our need for that type of relief would be pretty plain. If your Honor were then to decide that we should in fact go after it on the merits, that would require, as Judge Rifkind has indicated, I think, a very long argument, and it would also require a great deal of time to prepare to meet this motion, which I assume Judge Rifkind's firm has prepared at their leisure. I do not think I could be prepared to argue this on the merits during the first week of May. I could argue it on the other branch of this at any time at all.

Mr. Rifkind: May it please your Honor, my good friend Mr. Lane has had my motion since the 8th of April, and while I am not unaware of the fact that on motions for summary judgment it is not at all uncommon for the party resisting the motion to suggest that other avenues of investigation might give him something which would enable him to meet the issues, I have never heard that such mo- [fol. 11481] tions are broken into halves, and that the first part is argued separately as a kind of preliminary or interlocutory application. It is one of the elements taken into consideration and I do not expect that your Honor will grant the motion for summary judgment unless I satisfy you that the statutory standard has been met, namely, that there is no issue of fact and that as a matter of law we are entitled to judgment.

If I cannot meet that issue for any reason, my motion will fail, and if my motion fails it is not appealable and that will be the end of this motion.

On the other hand, I think we will be able to demonstrate it. I think we have made our motion on relatively narrow ground. I think that Mr. Lane knows fully the grounds upon which we have made our motion, and if it should serve any purpose, if your Honor would want to direct me to serve a brief in advance of the argument date to further narrow the basis of my motion, I will be glad to comply with such a direction. That might tend to facilitate Mr. Lane's preparation, and within a very short time I would be prepared to do so.

Mr. Lane: If I might just say this before your Honor speaks on that, contemporaneously with the service of the [fol. 11482] motion papers I was informed that I need not be prepared on the 25th, which is the return date—

Mr. Rifkind: That's correct.

Mr. Lane: —because an application would be made for an adjournment, looking upon this on the merits. Being myself engaged in other matters, I therefore have not dropped them to work on this, thinking we would have a substantial adjournment if we went into the merits. I do not think we need to take the court's time on the merits, and I think we can demonstrate that, and if that is so, it seems to me your Honor, controlling the mechanics of this case at this point, would not want to have us go into the merits to the length that Judge Rifkind has indicated.

The Court: Do other counsel in the matter have any suggestions?

Mr. Steyer: If your Honor please, my name is Roy Steyer of Sullivan & Cromwell, counsel for Standard Oil of New Jersey.

As Judge Rifkind has indicated, the senior trial counsel for New Jersey, Arthur Dean, is presently out of the country on a mission. The Government does not expect him [fol. 11483] back until the end of the month.

In view of what has been said today, it is quite clear to me that the other defendants have more than an academic interest in the motion that Judge Rifkind is preparing.

If it suits your Honor's schedule to meet on this motion in the first week in May, that will be a fairly short time for Mr. Dean to get back and adjust his affairs and get prepared; but if that is your Honor's schedule we can meet that.

Mr. Pollack: If your Honor please, I represent British Petroleum Company. Merely as a matter of personal convenience, if the first week of May is accepted, I hope it can be on three of the five days during that week, omitting the fourth and the sixth, if there is no inconvenience to the court and other counsel, because I have to be in the Appellate Division First Department on each of those days.

The Court: Mr. Pollack, I think in the interest of expedition and so that we may all collaborate in fixing a date that will be least inconvenient to everybody, I might disclose to counsel my own schedule so that the ingenuity of counsel may be available to the court. That will give [fol. 11484] us a frame of reference.

On April 26th, which is a Tuesday—this is off the record, Mr. Reporter.

(Discussion off the record.)

The Court: Very well. The record will now disclose, after a conference with counsel, that the motion made by Cities Service Company is set down for argument on May 9th at 10.30.

Mr. Rifkind: Thank you, your Honor.

The Court: The movant will serve and file a brief in support of the motion as soon as possible, serving the plaintiff and the other defense counsel, and Mr. Lane in behalf of the plaintiff will serve and file an answering brief as soon thereafter as can be done, with all convenient speed.

Mr. Lane: Yes, sir.

The Court: All right, gentlemen.

Mr. Rifkind: Thank you very much.

Mr. Lane: Off the record.

(Discussion off the record.)

(Adjourned to May 9, 1960 at 10.30 a.m.)

[fol. 11485]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 110-223

---

GERALD B. WALDRON, individually and doing business as CONSOLIDATED BROKERAGE, Plaintiff,

vs.

BRITISH PETROLEUM CO. LTD., CITIES SERVICE CO., SOCONY MOBIL OIL CO. INC., STANDARD OIL CO. OF CALIFORNIA, STANDARD OIL COMPANY (NEW JERSEY), THE TEXAS COMPANY, Defendants.

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**Transcript of Hearing—New York, May 9, 1960**

10.30 o'clock a.m.

Before: Hon. William B. Herlands, District Judge.

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[fol. 11486] APPEARANCES:

Casey, Lane & Mittendorf, Esqs., Attorneys for Plaintiff; Samuel M. Lane, Esq., and Robert P. Beshar, Esq., of Counsel.

Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., Attorneys for Cities Service Co.; Simon H. Rifkind, Esq., Edward N. Costikyan, Esq., and Arthur B. Frommer, Esq., of Counsel.

Sullivan & Cromwell, Esqs., Attorneys for Standard Oil Co. (New Jersey); Arthur H. Dean, Esq., Roy H. Steyer, Esq., and Hamilton F. Potter, Jr., Esq., of Counsel.

Milton Pollack, Esq., Attorney for British Petroleum Co., Ltd.

Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for Socony Mobil Oil Co.; James R. Withrow, Jr., Esq., William Rogers, Esq., of Counsel

and

Dorr, Hand, Whittaker & Watson, Esqs., Attorneys for Socony Mobil Oil Co.; Goldwaite H. Dorr, Esq., and Robert Thornton, Esq., of Counsel.

Cahill, Gordon, Reindel & Ohl, Esqs.; Attorneys for Standard Oil Co. of California; John F. Sonnet, Esq., and William M. Sayre, Esq., of Counsel.

Kissam & Halpin, Esqs., Attorneys for The Texas Company; Leo T. Kissam, Esq., Seth M. Dabney, III, Esq., P. Richard Mercurio, Esq., and Amzy B. Steed, Esq., of Counsel.

[fol. 11487] Mr. Rifkind: Defendant is ready.

Mr. Lane: Plaintiffs are ready, your Honor.

The Court: You may proceed, Judge Rifkind.

ARGUMENT BY MR. RIFKIND

Mr. Rifkind: Thank you, your Honor.

I believe that some time ago, your Honor received from us a brief in support of our motion for a summary judgment, and last Friday afternoon we received a brief from the plaintiff.

We have examined the plaintiff's brief, but it may be that we shall want to write some remarks in response to it; indeed, I have written some, but I am not sure that it is ready for submission.

With that preliminary, your Honor, I would like to address myself to this motion, and in doing so, I should like to depart somewhat from the normal procedure. I would first like to take a minute to take a look at the procedural context in which we are involved.

We have made a motion for summary judgment under Rule 56. I can still remember when the use of summary

judgment was regarded as a fairly radical notion in civil procedures, and I can remember the time when one of my then senior partners traveled through the neighboring counties to encourage the bar in the use of this new nos- [fol. 11488] trum. But of course, since then, summary judgment has had a very considerable growth and development, and it is interesting to observe, your Honor, that not only has the use of summary judgments grown in extension, that is, more and more jurisdictions have adopted this tool and made it part of their arsenal of procedural devices, the most conspicuous addition to the ranks although, of course, being the Federal system, but also it has grown in the states and in jurisdictions which had adopted it in intention, progressively.

The kinds of causes of action which were subject to summary judgment, the occasions when it could be used have all been expanded in the jurisdictions which have employed it, and it has been given more and more flexibility by such devices as partial summary judgment and other methods, because its utility, its serviceability as a saver of time, as a conserver of judicial effort, as a screen to throw out of the crowded calendars of the courts the spurious issues, have come to be recognized.

It has a very interesting correlation in the Federal system, particularly to two procedures which have now become firmly established in the Federal procedural ar- [fol. 11489] rangements.

Under the Federal Rules of Civil Procedure, whether we so call it or not, we operate by a system of notice, pleadings. The old common law notion that you have to state a cause of action in your complaint has been pretty well expelled from the Federal system.

Also in the Federal system we have a very liberal set of arrangements for pretrial discovery and examination.

Your Honor can very readily see that in a system of civil procedure which requires very little disclosure upon the complaint and which permits the broadest kind of exploration after the complaint, abuses could mount to the point

where they would become intolerable but for a safety device like a motion for summary judgment, designed to clear away the case once it is demonstrated that there is no genuine issue, no material issues to be tried.

I must say to your Honor that in this Circuit there came a time when summary judgment received a considerable setback. It was in the middle '40s, I believe in 1945 or 1946, when the Court of Appeals of this Circuit, by a divided court in the renowned case of Arnstein v. Porter, certainly [fol. 11490] wrote or appeared to write a summary judgment out of plagiarism suits and indicated that it looked upon the device with a high degree of disfavor, with the result that its application in this Circuit was to some extent diminished for a time after that.

If I may take a little aside, your Honor, I will indicate later as we argue the law that what appears to be the stringent rule of Arnstein v. Porter no longer is the governing rule. But be that as it may, I think it is well to understand the psychology of that very eminent jurist, Jerome Frank, for whom I have tremendous admiration and affection. I think it psychologically interesting to discover what it is that I think induced Judge Frank to write as he did in Arnstein v. Porter.

Judge Frank had written extensively against the use of the jury system. Now, of course, Judge Frank was a scholar of the law and knew that the jury was one of the treasured gems of the American judicial system, one which commanded a great deal of respect by the lay public, indeed, regarded as one of the sancta of our popular notions of good judicial traditions, and yet he leveled one shaft after an- [fol. 11491] other against the jury system in all of his writings, and Judge Frank needed to compensate for this apostasy with respect to one of the sacred concepts of the law by an extraordinary devotion to another sanctum, namely, the so-called day in court.

So, having written juries out, he then came back and said, "But we must have a day in court for every conceivable issue," and Arnstein v. Porter was the result.

[fol. 11492] I think it might interest your Honor to know the consequences to Arnstein of what happened as a result of Arnstein v. Porter. You know, brother Arnstein sued the author of every smash success on Broadway for infringement of copyright. I think at the time Arnstein v. Porter was decided he had already had some five or six lawsuits, after Arnstein v. Porter his activity increased, and with Arnstein v. Porter it was impossible to avoid the vast expense of these highly costly lawsuits from proceeding.

But one of my partners then discovered a remedy for Arnstein v. Porter, and it was a relatively simple one. There haven't been any more Arnstein cases since then. First we got Judge Dimock to stay Arnstein's next lawsuit until he paid up the costs which he had incurred when he lost all of his other lawsuits. He had never won a lawsuit in this courthouse. Bills of costs had remained unpaid and accumulated. And finally we went to Judge Dimock and said that it didn't seem right that this man should just go on annoying his fellow citizens when he hasn't exhibited an ability to discharge his previous applications. That was granted. After that we appointed a receiver of all his claims in order to develop some assets for the satisfaction [fol. 11493] of those judgments. That put the quietus on that chapter of plagiarism history completely and finally.

I am suggesting this rather circuitous route because it points up the dangers of what can happen to a situation where there is the salutary device of interposing a screen between irresponsible litigants and affluent defendants. There must be some screen or else the judicial process is abused. The screen contemplated by the Federal Rules of Civil Procedure is the motion for summary judgment.

Now I might say that even after Arnstein v. Porter many of the judges of this district continued to apply summary judgment as they believed it should be applied, and one of the cases decided shortly after that is one that your Honor cited in Harris v. Fawcett Publications. It is the first case you cite, and the name of it is Millstein v. Hayward. And, although it may involve me in some immodesty to call your

Honor's attention to that decision, I very humbly suggest that it will repay re-reading because it throws light, I think it does, upon the judicial process involved in evaluation of a set of facts to determine whether summary judgment [fol. 11494] should or should not lie. And it might interest you, of course, that that was a plagiarism suit, the very kind of a suit to which Judge Frank addressed himself. Summary judgment was granted, and it has since been cited approvingly on a number of occasions.

Shortly thereafter there was an antitrust suit. Now, that certainly seems like a strange place in which to invoke summary judgment, all these so-called complex notions of the degree of competition, whether the interference was substantial, all of the apparent issues that surround a normal antitrust suit. There the moving party in International Salt was the Government. Summary judgment was granted. Summary judgment was approved by the United States Supreme Court.

Suffice it to say, your Honor, that I have had a check made, and suggested to me by one of my colleagues in this lawsuit, as a matter of fact, which indicates that the Court of Appeals has been affirming the grant of summary judgment and that district judges of this court have been granting summary judgment. I think since 1957 they granted summary judgment in 17 cases out of 48 applications, which shows their fairly high rate of granting it and that the [fol. 11495] Court of Appeals has affirmed, in antitrust cases, summary judgment and that it has not denied justice to any litigant who had what the statute requires, a genuine and material issue.

Let me summarize what I think is the meat of this whole contest between summary judgment and those who are apprehensive that it will deny the litigant a day in court. Here you have, as I see it, a very potent medicine. Maybe we ought to call it in the law a wonder drug. It has to be used exactly as indicated on the label because, if it is used other than as indicated on the label, it may have dangerous side effects. It has to be used with caution but, when used

with caution, when used as directed on the label, when used as appropriate, it is a tremendously desirable and useful device and remedy, and the only concern, the only thing to look for in the diagnosis of the case to determine whether this remedy is suitable or unsuitable is: Is there a genuine issue over a material fact? These are, of course, notions that are common to the law and need not be elaborated again.

Now, with this little prefix with respect to the general procedural context, I want to get to the case. I think it [fol. 11496] might be useful for your Honor to have a word about the historical context in which this case is set because this case, although a trivial footnote to history, nevertheless is a footnote to history.

Back in May of 1951 the Iranian Government, then in the hands of someone we might call, in modern terminology, the Iranian Castro, a gentleman by the name of Dr. Mossadegh, expropriated the oil properties in Iran which were the property of the Anglo-Iranian Oil Company now known as British Petroleum Company.

I need hardly suggest to your Honor, indeed you could take judicial notice, that an act of that daring, of that magnitude, an act having such far-reaching implications would inevitably arouse a vast storm of concern not only among the people who own those properties but among all other corporations that had interests in that part of the world, who apprehended that this example might prove contagious; among all of the Western nations, and particularly on the Continent of Europe who were the customers for the oil, which flowed out of Iran, which was refined in the Abadan refinery and was marketed by Anglo-Iranian; and, from a defense point of view, all of the Western na- [fol. 11497] tions, including the United States, who were quite apprehensive that the fuel necessary to fire the engines of production of the whole Western world were in jeopardy. Inevitably every responsible participant, governmental and private, in the whole complex known as the oil industry began searching for a solution to this problem. Governmental,

private, whatever it may be, a solution had to be discovered so that once again Iranian oil might flow in its accustomed channels.

I shan't go into the vast steps taken in this country to help protect the European customers who had previously been supplied by this source of oil and other things that happened. But now, into this tornado, walked a man by the name of Waldron. I withdrew what I say. He didn't walk in. He rushed in, with the proverbial speed of those who act otherwise than the angels.

Now, who is Mr. Waldron, according to his deposition? He was a food broker located in the City of Denver. His success in his chosen field of business had not been conspicuous down to that time; his earnings were somewhat under the $10,000 mark per annum; his knowledge of oil [fol. 11498] was zero; his contacts with oil people were zero; his capital, zero; and his experience as a businessman in connection with oil can best be described by reading one answer to a question put to him on his deposition. Referring to his contacts and experience in oil:

"Q. You did not come across any of it in connection with any business transaction in which you were engaged other than buying 10 gallons of gas for your car?

"A. That's right."

So there he was, Waldron, like Alice in Wonderland, rushing into this oil situation. Surprised he was when he soon discovered that the faster he ran, like Alice, the less progress he made. He discovers that Anglo-Iranian is threatening to sue anybody who would trade in oil which Anglo-Iranian regarded as stolen property. He discovered that some other people were not eager to trade in a commodity the trade of which might subject them to lawsuit. He might even have discovered some who, as a matter of principle, would not encourage a government that was bent upon expropriation. He discovered that he couldn't find tankers to carry oil from Iran to the United States, a trade which had heretofore never existed so that there were no

[fol. 11499] such tankers in such a trade, the flow of oil from Iran having been to Europe and not to the United States.

He discovers to his amazement and dismay that in the banks in the greater centers of finance downtown, in Lower Manhattan, he is unknown and that, being unknown, they are not quite prepared to make or enter into million-dollar or multi-million-dollar transactions with him.

All of this undoubtedly disturbs Mr. Waldron no end.

Now, I don't know when it happened, but at some stage in this period, probably after this episode came to an end—but I am not sure—Mr. Waldron comes to the conclusion that this vast storm to which I referred, this tornado that was blowing, was all funneled and aimed at Waldron. He was the sole object of this entire enterprise. All this litigation, all these threats of litigation, all this resistance, all this lack of tankers, the lack of finance—everything, the whole thing was addressed to Waldron.

I think it takes a very considerable egocentricity to arrive at such a supposition.

But you see, this was very heady wine that Mr. Waldron [fol. 11500] was drinking, having left Denver, where he had been selling nuts and similar items of food, and suddenly he finds himself flying back and forth to Persia, where he meets governmental officials, State Department officials, oil merchants—this is pretty important stuff in his life. So he develops this notion.

To a degree it reminds me of the story of the small moth who in the first Fourth of July after the war of independence was won, emerged from his chrysalis and looked around and saw bonfires all around, and he said, "My, what a wonderful sight, and all for me", and as he flew around until his wings got singed, he kept believing that those bonfires were all there to warm the heart of this small moth.

As far as I know, there is only one instance in history when a storm was directed at a single individual, and the Scriptures report that the prophet Jonah, when he was on board a ship which was tossed around by the tempest, when he was asked by seamen whether he knew what the cause

of it was, I think he said, "I am the cause of this storm" and asked to be cast into the sea.

But there is a tremendous difference. Jonah, as I remem-
[fol. 11501] ber, was engaged on a divine mission to save the Assyrian civilization. I don't think that he, like Waldron, was out to just make a quick buck. And let there be no doubt about it: Waldron had no interest in finding a solution to the Iranian problem. He was not concerned with America's interest in that situation. All he was interested in was to see whether out of this disturbed situation he could make a quick dollar.

Now, in the midst of this I have got to take Waldron into his first contacts with Cities Service Company, the moving defendant in this case.

This happened more than a year after the nationalization and a considerable time after Mr. Waldron has been busy in his attempts to become the greatest oil merchant of all of the planet earth.

In July of 1952, I believe the 8th of July, 1952, according to his deposition, he has his first meeting with any official of the Cities Service Company. He is introduced to the Cities Service people by an oil broker.

Now, it is an interesting commentary upon the democracy of American business that this unknown, this novice, this interloper in the oil business is nevertheless well received [fol. 11502] at Cities Service. He is cordially treated at Cities Service. He is given access to every official whom he desires to see. Nobody boycotts him; nobody excludes him; and his proposals are seriously listened to.

Now, what is he doing? To put it in the simplest terms, he is a drummer, and he is drumming Iranian oil, and that is what he offers to sell to the Cities Service Company.

At that time, Cities Service Company needed oil. At that time Cities Service Company was not getting any oil from the Middle East.

He claims that he has a contract with the Iranian Government for the purchase of many millions of tons of oil. Whether he has such a contract or not is not material on

this motion. There is some very important question about that, but he represents that he has a contract which would enable him to buy oil, to get oil from Iran.

He is told by Cities Service people—and this is all derived from his own deposition; that is all we have here, is his deposition—he is told that Cities Service was not interested in buying any quantities of oil that he has for [fol. 11503] sale under his so-called contract. He is told that Cities Service is interested in finding a solution to the Iranian oil problem and that in such a solution Cities Service would be willing to make a contribution and that if it were necessary, Cities Service would be willing to undertake to manage the Abadan refinery and to reactivate it under appropriate contracts with the Iranian Government and that the officials of Cities Service would be willing to go to Iran to look the situation over to see what can be done.

Waldron and his associates suggest that they can procure an invitation from Mr. Mossadegh, to invite Mr. Jones of Cities Service to go to Iran.

In due time, such an invitation is received. Jones goes to Iran. He inspects the property. He evaluates the situation, and he comes to a conclusion. He comes to the conclusion, which is testified to by Mr. Waldron in his deposition: Mr. Jones tells Mr. Waldron that they have struck a dry hole.

I don't think I need to translate this oil slang for the information of this Court.

Now, for reasons that escape me, Mr. Lane annexes a newspaper story to his answering affidavit. I think Mr. Lane will agree with me that this is the story to which Mr. [fol. 11504] Waldron kept referring during his deposition when I examined him.

Am I not right, Mr. Lane?

Mr. Beshar: No.

Mr. Rifkind: It is not the clipping to which reference was then made?

Mr. Lane: I don't know, Judge.

Mr. Rifkind: In the course of his deposition, Mr. Waldron repeatedly said that he knew something on the basis of a newspaper clipping. He was asked to produce that clipping. I don't believe it was ever produced.

Well, whether it is the same or not, Mr. Lane annexes this clipping. It is a report in the New York Times of an interview given by Mr. Jones while in Teheran, Iran, at the closing days of his stay in Iran.

I will read a couple of paragraphs:

"W. Alton Jones, president of Cities Service Oil Company, an American oil refining and distribution concern, indicated in a press interview today that he might be willing to assist Iran in operating her oil industries again. He also indicated that he might buy oil from Iran, irrespective of whether there was a British-Iranian oil settlement [fol. 11505] and irrespective of whether Britain and the Anglo-Iranian Oil Company would take legal action against his company for handling Iranian oil. He denied, however, having made any agreement or commitment to do anything or having come to any final decision and stated that he discussed the purchase of oil only as a remote possibility."

I solicit your Honor's attention to the rest of this article.

It is an interesting thing, it is true that Jones returned to the United States, and there never was any arrangement or deal made between Cities Service Company and the Iranian Government or the Anglo-Iranian Oil Company, whichever it might be, or with Waldron.

It is also interesting, however, that throughout this examination, this deposition of Mr. Waldron, when he was asked to state each and every conversation he ever had with any official of Cities Service Company, and he did narrate a great many of them, at no time—and I reemphasize that—at no time did Mr. Waldron testify that he asked either Mr. Jones or any other official of Cities Service why there was no deal between Iran and Cities Service Company.

The next chapter which has an important contextual relationship to this motion is the so-called United States liti-
[fol. 11506] gation.

I believe it was in 1953 that the United States filed a complaint against a number of oil companies accusing them of violations of the antitrust laws. The accusation was that they had conspired to restrain interstate and foreign commerce in oil, that they had conspired to increase the domestic price of oil and that they had conspired to monopolize the trade in oil between the United States and foreign countries, and the means are alleged in paragraph 9 of the Waldron complaint.

Now, Cities Service was not a defendant in that case. Cities Service was not named as a co-conspirator in that case. Cities Service was not named, mentioned or identified in that case. Cities Service was not included, directly or indirectly, in the allegations of that complaint.

I would suppose that the United States has at least as good access to information and means of investigation as Mr. Waldron. The United States did not see fit to include Cities Service among those whom it accused of participation in this so-called conspiracy.

Since then, seven years have gone by. I suppose there has
[fol. 11507] been considerable activity in that case, although I haven't participated in it. Not to this day has the United States amended its complaint so as to include Cities Service as a defendant or a co-conspirator in any other capacity in that litigation, and I would suppose that the United States by this time has had access to everything that Mr. Waldron had.

On the coattails of the United States complaint, Waldron filed his complaint, and I will at least credit Waldron with the proposition that with respect to every allegation of the complaint which he copied out of the Government complaint—and I do not mean to say that in any offensive or derogatory sense; it is perfectly all right for him to copy the Government's complaint if that is what he wants to do

—but in each case since he now had additional defendants he interposed the phrase, "except Cities Service", and to make assurance doubly certain, on his deposition he again stated under oath that he had no intention of accusing Cities Service of a participation in the conspiracy which is alleged in the Government's complaint.

Cities Service is mentioned in the complaint in just two [fol. 11508] places and only two places. I don't know whether your Honor has a printed copy of the complaint or a typewritten copy. The pagination is different. But on page 18 of the typewritten version, paragraph 10, letter (i), subdivision 6 of the complaint, he alleges as follows:

> "Prior to 1952, Cities Service had been unable to obtain a source of crude oil in the Middle East because of the aforementioned allocation agreements"—

to which he had referred in other portions of his complaint.

In other words, your Honor, in this sentence he casts Cities Service in the role not of conspirator but of victim.

He continues:

> "Cities Service indicated to plaintiff a great interest in purchasing his entire supply of and obtaining a managerial contract for all Iranian oil exploitation and production in the Iranian Government"—

and I interpose here that in his deposition, your Honor, he testified that that "and" in that sentence must be taken strictly in the conjunctive, that he understood that the in- [fol. 11509] terest in acquiring oil was only in connection with the obtaining of a managerial contract for all Iranian oil exploitation and production and so forth.

He continues in his complaint:

> "It was contemplated that in return for its services Cities Service would receive payment in oil, thus assuring it a crucially needed source of supply."

Then he goes on to allege that Cities Service asked if plaintiff would be able to get an invitation from the Iranian Government that Cities Service inspect the installations and that plaintiff did get such an invitation and that the officials of Cities Service with the plaintiff did go to Iran in August of 1952.

Then he continues:

> "There, after a full inspection, Jones"—

referring to the president of Cities Service Company—

> "determined that the installation could be reactivated. He proposed"—

says the plaintiff—

> "to the National Iranian Oil Company that over a course of years Cities Service would exploit and man- [fol. 11510] age the Iranian oil resources while undertaking to train Iranian technicians in the United States and building a tanker fleet for the Iranian Government so that ultimately the Iranians could exploit and manage for themselves their valuable oil resources."

So Mr. Waldron says that he knows that Jones made such a proposal to the Iranian Government. I don't know how he knows, but in his deposition he said that Jones never told him what he proposed to the Iranians. He was never present during a proposal to the Iranians. But I lay those questions aside. He alleges that Jones made such a proposal to the Iranians.

But the interesting thing is, he does not say that the Iranians were interested or accepted such a proposal.

It stops at that point as far as the arrangement between Cities Service and Iran are concerned. He goes on instead with the following:

> "Learning of Cities Service's intention to force itself in this manner to the Middle East oil complex,

Gulf Oil and Anglo-Iranian during late August or early September, 1952"—

[fol. 11511] and I ask your Honor to underscore those words "during late August or early September, 1952"—

"conspired to and did offer Cities Service and Cities Service did accept a vast, long-term supply of Kuwait oil at a price far below the posted International Gulf of Persia price."

In other words, what do we have here? We have an allegation that Gulf and Anglo-Iranian conspired to offer Cities Service a big bargain, presumably to dissuade it from buying the Iranian oil.

Then he goes on:

"At this time and by these acts, Cities Service, without the knowledge of the plaintiff, entered into combination and conspiracy with the other defendants, and in furtherance of defendants' scheme broke off further negotiations with the plaintiff and with the Iranians."

Then he goes on and makes the next allegation:

"As a further consequence of this conspiracy"—

namely, the conspiracy to offer Cities Service a bargain in Kuwait oil—

"Cities Service eventually gained a participation in the consortium agreements relating to Iranian oil hereinafter described."

[fol. 11512] The next one says that we concealed these facts from him.

That is the first allegation he has about Cities Service, and the last one is in subdivision 9 of the same section, appearing on page 21 of the typewritten version of the complaint, where he says:

"Finally, on October 29, 1954"—

that is more than two years after this visit to Iran—

"Anglo-Iranian, Jersey"—

meaning Standard Oil of New Jersey—

"Socal"—

meaning Standard Oil of Southern California—

> "Texas, Gulf and Socony, with others, in furtherance and effectuation of the aforesaid conspiracy, combination and monopolization, entered into the consortium agreements which agreements divided up substantially all of the Iranian oil production, thereby bringing to final and complete frustration plaintiff's efforts to market Iranian oil in free competition."

There is the next sentence in which he mentions Cities Service:

> "Shortly after the signing of the initial consortium, Cities Service was permitted to purchase a participa-
> [fol. 11513] tion in the consortium."

Not another word in this complaint with respect to Cities Service, other than what I have just indicated.

So that we have, as against Cities Service, this allegation: That Gulf and Anglo-Iranian conspired in August and September of 1952 to offer Cities Service a bargain in Kuwait oil and that the defendants permitted Cities Service to purchase a share in the consortium.

So when I read that complaint, I assumed, and I believe correctly, that what the plaintiff was trying to charge Cities Service with was that it had been bought off from doing business with him by being given an opportunity to do business with Gulf Oil at more attractive terms.

But to make certain, we examined him with respect to these matters on his deposition, and I won't elaborate this

part of my argument, your Honor, for the reason that it is set forth in meticulous detail in my brief, and I must say for Mr. Lane that he does not challenge any of the things therein asserted.

Waldron repeated under oath time after time after time that until he discovered that Cities Service had made a [fol. 11514] contract to purchase oil from Kuwait, he had no complaint whatever against the conduct of Cities Service as against him, that until he learned of that transaction, he did not regard that Cities Service had done anything to hinder him, to boycott him or to boycott Iranian oil, that it had not participated in the accused conduct that he attributes to the other defendants of interfering with financing or tankers or any other thing.

He said, "But for Kuwait and the consortium, I would not have made Cities Service a defendant in this action."

I can't put it any more explicitly, because I have set it forth in detail, and I have had no resistance to it in the answering papers.

Just to give you the flavor of what I mean, let me read just one or two questions, addressed to Mr. Waldron:

"Q. And as of this morning"—the day of the examination, which was October 26, 1959—"you are telling me, and I assume truthfully, that the two events which you identify as causing you to name Cities Service as a defendant here are the contact with Gulf and the entry into the consortium?

[fol. 11515] "A. Yes."

This is an interesting question which I had not intended to read, but I think it might give you a little more of the flavor of this irresponsible plaintiff:

"Q. I believe you also allege in your complaint that Cities Service was therefore, as a consequence, permitted to buy a participation in the consortium in Iranian oil?

"A. Yes, sir.

"Q. Do you have any evidence that you can point to, Mr. Waldron, that Gulf and Anglo-Iranian conspired to make such an offer? Have you anything in writing?

"A. No.

"Q. Did Anglo-Iranian or any officer of Anglo-Iranian say so to you or anyone that you know?

"A. No.

"Q. Did Gulf or any officer of Gulf say so to you?

"A. No.

"Q. So I take it that you have neither written nor oral evidence that Anglo-Iranian and Gulf conspired to make an offer to Cities Service?

"A. All I know, Judge"—he is addressing me there—[fol. 11516] "is, the deal was consummated."

I asked him at page 6416:

"Q. Isn't that a correct statement of affairs, that with respect to the entire conspiracy recited in subdivisions 8 and 9"—

and those are the subdivisions referred to—

"down to Kuwait, down to the making of the Kuwait agreement, you have no complaint with respect to Cities Service?

"A. In general I would say that is correct, sir."

And so it goes on, paragraph after paragraph, item after item. I took him through this complaint from alpha to omega, and he said, "The only things that disturbed me were the making of the contract with Gulf for the purchase of Kuwait oil or the entry"—or he believed that Cities Service became a member of the consortium.

He admitted that he had no information of a conspiracy between Anglo-Iranian and Gulf to make the offer to Cities Service of a bargain. He had no information as to when—and the "when" is of the maximum significance—he had no information as to when Gulf offered to sell Kuwait oil to Cities Service.

[fol. 11517] He had no knowledge or information as to what was Cities Service's relationship to the consortium nor how it came about.

I am now telling you what he testified to under oath.

All he had was, he said he read a newspaper clipping, and he overheard a statement made by Mr. Jones.

The statement that he overheard Mr. Jones make, he says, was that once in Iran Jones said, "On my desk lies an offer from across the Gulf for oil at a dollar a barrel", and from that he conjectured that then Cities Service had received an offer of a bargain to divert it from the Iranian trade.

So, with the case in that posture, it seems to us that the thing to do, assuming that we had a plaintiff of integrity, was to demonstrate to him by proof which no rational mind could resist that he was wrong on both propositions, and we harbored the illusion, the fanciful illusion that when we had made such a demonstration to the satisfaction of any rational mind, that Mr. Waldron would abandon his suit against Cities Service.

So we therefore undertook to make a demonstration by [fol. 11518] contemporaneous, unquestionable, genuine documentary evidence that the Gulf offer of Kuwait oil to Cities Service was made before Mossadegh became Prime Minister of Iran, that it was made before Anglo-Iranian's oil installations had been nationalized. But, more important, the detailed terms of quantity, price, location, methodology had all been formally offered and accepted, offered by Gulf and accepted by Cities Service long before Cities Service had ever heard of the existence of brother Waldron.

And we then proceeded to demonstrate that after agreement had been reached formally and in writing—I am not speaking of some kaffeeklatsch conversation as to all of these terms—it was turned over to the legal draftsmen to put the language into refined terminology.

This was a contract which involved 21,000 barrels a day, every day, 365 days a year for 12 years. You can imagine that it required care. It was in a new trade. The contract required that a fleet of tankers be built for this particular trade. The contract required that the cost of those tankers be amortized as part of that trade and the price was deter- [fol. 11519] mined by relationship of what Cities Service would have to pay in Philadelphia for oil if it bought it in

the Gulf of Mexico in the American market, the transportation to Philadelphia, and it involved another thing: Cities Service did not have refining capacity to refine this oil, although it needed the products for its consumer business. [fol. 11520] So it involved a refining operation by Gulf Oil in its Philadelphia refinery for the benefit of Cities Service.

I mention these major categories of the contract to indicate to you that it is not at all surprising that it took some months before that was all finalized. But I have said under oath, and we have submitted the documentary proof, that the final contract as written is exactly, term for term, item for item, price for price, location for location, barrel for barrel, the same contract that was approved by the party, by offer and acceptance, before Waldron ever saw 60 Wall Street or 70 Pine Street where Cities Service has its offices.

It is not denied in the answering papers, it is not controverted, there is no suggestion, nobody has pointed to any provision of the ultimate agreement, which was signed later that year, showing a departure, although my learned adversary gives himself the liberty of, in one place in his brief, referring to increasingly attractive terms. I say that is not so.

Now, if it be true, and it is true, that long before Waldron was on the scene or Cities Service had ever heard of him they had already made a firm and binding deal—indeed, [fol. 11521] your Honor, the bids were already out for the tankers before Waldron was there—then how could this Kuwait deal ever have been the price paid to Cities Service in order to induce it to stay away from Iranian oil? The whole proposition, the whole foundation of Waldron's accusation as against Cities Service crumbles into the dust. So I thought that Waldron, being an honest man, would say, "Well, I made a mistake."

But how about the Consortium? So we said, All right, we will produce the documentation about the Consortium.

It is suggested in the complaint that as part of the price to buy off Cities Service from doing business with Iran and,

instead, diverting its attention to Kuwait the defendants invited Cities Service to become a member of the Consortium. Well, that Mr. Waldron claims he learned in another newspaper item.

The trouble with history is, in the United States, anyway, that it doesn't get rewritten like in some other parts of the world. It so happens, and the documentation we have produced are not our documents, they are the State Department papers, they are the papers of other parties, that [fol. 11522] the Consortium idea was not even a gleam in the eye at the time that Mr. Jones said, "I have struck a dry hole." Moreover, and here is the interesting thing, it appears that the defendants did not admit Cities Service to membership. Indeed, they excluded them. They excluded all the independents. And thereupon, there was a protest on the part of a great many independent oil producers in the United States, including Cities Service, whereupon they went to the State Department, and it was the State Department that urged the other members of the Consortium to set aside a 5 per cent interest for American independent oil companies, and it was the State Department that suggested that the firm of Price, Waterhouse & Company be designated to pass upon the financial ability of those who would apply for participations in the Consortium, a great many companies applied, including Cities Service, and some were rejected and some were accepted and finally 12 were accepted.

Then the documentation shows that Cities Service insisted that, because it had asked for the entire amount, the entire 5 per cent, and whereas some of the other companies had asked for small fractions, the ultimate allocations should be in proportion to the original request. There was [fol. 11523] a tremendous debate about it. The defendants did not participate in those meetings. Only the independents participated. The minutes of those meetings are here. And the result was that they could not come to agreement, and they then finally went to Herbert Clark Hoover, As-

sistant or Under-Secretary of State, and he decided that it should be on an equal allocation.

Then this documentation shows that that would have turned out to give Cities Service 45 hundredths of 1 per cent of the Iranian Consortium and, rather than be involved in that kind of a niggardly thing, Cities Service assigned its share to Richfield Oil, a company in which it was a substantial stockholder. All this happened in 1954, long after the dry hole, and the notion, therefore, that this was a price for diversion is silly.

In the answering papers, your Honor, we discover a brand new approach to this entire thing. I find no challenge to any statement of fact in our moving papers. I find no denial of the genuineness or integrity of any document that we have served. What do I find? The whole thing is stood upon its head. We are now told that the Iranian trans- [fol. 11524] action was vastly more valuable than the Kuwait transaction. Whereas in the complaint it was that there was a tremendous bargain offered to Cities Service in order to induce it to stay away from Iran, now it is something different. Now they say Cities Service had a choice to either take the tremendous multi-billion dollar opportunity or the trivial opportunity that was represented by Kuwait. Why did they take the lesser?

Well, if it is the lesser, how can you bribe somebody to stay away from the multi-billion dollar transaction by offering him a lesser one? The whole thing makes no sense. The whole thing becomes absurd and ridiculous. You cannot bribe a man with an apple when he can get an orchard full of apples. Now they tell us that the choice was between the greater Iran and the lesser Kuwait.

So they say to us:

> "Well, who knows? Maybe there was some secret deal."

Maybe there was some secret deal; and maybe there are men walking the other side of the moon, your Honor. If

there is any proposition laid down in the cases on summary. [fol. 11525] judgment, it is that you cannot create a genuine issue of a material fact by asking a suspicious question.

I solicit your Honor's attention to two opinions which I will cite to you, one by Judge Leibell, as meticulous a craftsman in this field—I am sure your Honor will share my view—as any judge who ever sat in this court, in the Banco de Espana case where, interestingly enough, the man who was raising the suspicious questions was not a raving maniac like the man in the Griffin case and about whom my friends somehow or other feel that because he was a raving maniac the Supreme Court's opinion loses some significance. I didn't understand that that was the way you rate Supreme Court opinions. In any event, the gentleman who raised the suspicious questions was a very distinguished gentleman. His name was John Foster Dulles, then the senior partner of Roy Steyer whom I saw two minutes ago, there he is, and Mr. Dean. But he was raising suspicious questions about some money that had been shipped by the Republican regime of Spain and which the subsequent Government was trying to reach from those who had preceded them. But Judge Leibell said: All these ques- [fol. 11526] tions that you are asking are just raising suspicions. I need a material issue, not a question.

And another case to which I would ask your Honor's careful attention is a decision by Judge Weinfeld in Morgan v. Sylvester. There, too, suspicion does not make an issue. Questions do not make a fact. Inquiries do not make evidence.

I make these comments because we have been served with a very interesting set of papers. We have been served with a set of papers which, instead of asserting some measure of evidence, such as the cases have said you need in order to qualify as presenting an issue, or some proof or which finds out some deficiency in our proof, we have been handed a set of questions, very interesting questions. I think, if we were having a program on television entitled "Face The

Lawyers," they would be very useful material for a script for that kind of a show.

For instance, they say:

"Why did Cities Service not take the Iranian oil?"

I say you haven't got a complaint and, since you haven't got a complaint, you haven't even got a license to ask me the question. I say you haven't got a complaint because

I say you haven't got a complaint and, since you haven't [fol. 11527] the complaint as you wrote it now lies in the dust. Today you couldn't get a lawyer to certify to the following complaint. What would he have to say? An honest complaint in this case at this moment would read something like this:

> "I was peddling Iranian oil, and among the prospects that I visited was Cities Service. I told them about it. They said they were not interested in the oil I was peddling but they would be interested in the oil refinery from which the oil came. So I took them out to look at the refinery and then they did not make a deal. Now I would like to know,"

says the complaint,

> "why didn't you buy that refinery? Why didn't you do business with me? What price was paid to you for not doing business with me?"

Is there any doubt in your Honor's mind that that kind of a complaint would not survive even the very tolerant attitude that the judges of this court have exhibited towards pleadings under the new notice form? Questions don't make allegations.

[fol. 11528] And here is the development in this case where we started with allegations in a complaint which on their face satisfied the Federal rules. From there we went to the deposition and discovered that the statement on information and belief was false; he had no information which would support a rational belief; that he was relying in his

complaint upon a misunderstood snatch of a conversation and on a misunderstood scrap of paper, and we can demonstrate that both of those were without merit or foundation. So, having traveled down to his conjecture, he now says:

"I am going to ask you some questions."

I don't believe that it is the law of this jurisdiction that you can go ahead and ask your prospects, who have refused to do business with you, "Why didn't you do business with me?" And I don't believe that the antitrust law says that every drummer who finds that his prospect won't deal with him has got to respond to an examination before trial before he can dismiss his complaint. And I don't believe that every promoter can bring his sucker into court and make him under oath say why he wouldn't do business with him.

I think when I said what this complaint would say I [fol. 11529] omitted a very interesting proposition. A more careful statement of that would have to be:

The plaintiff says "I have never had any contact with the oil business and I haven't any money to go into the oil business and I don't know anybody in the oil business, but nevertheless I am trying to sell oil." And he approaches Cities Service, as I have indicated, and offers them some oil and they say they are not interested in his oil but might be interested in managing the refinery. Then Cities Service inspects the refinery, and the plaintiff in his complaint and in his deposition refuses to say, because he doesn't know, whether the owner of the refinery was willing or not willing to make a deal with respect to the refinery, so that the negotiations drop off. And I say that on that situation the plaintiff is not entitled to an examination. I say the defendant is entitled to a summary judgment.

The theory now advances that, because the plaintiff made a contact with Cities Service and had a conversation in which Cities Service exhibited some interest in his business, from that point on Cities Service is infected with the

virus of antitrust violation, that Waldron is a kind of [fol. 11530] Typhoid Mary carrying the germ of antitrust violation.

Once you have touched his hand, you either do business with him or you are going to take the stand and testify why you did not.

I think, if we develop that kind of a notion in the antitrust law, we are going to restrain trade to the degree where all the conspiracies that have ever been tried under the antitrust laws would be but a twinkling of the eye.

If the original theory is true as recited in his complaint that the Kuwait oil was a better buy than the Iranian oil, then the answer to the question is a very simple one:

A buyer is entitled to buy that which is more attractive to him in the marketplace and he doesn't have to explain to anybody why he does it. If the new theory is true that the Iranian transaction was vastly better and more important than the Kuwait transaction, then again the story makes no sense because how can you bribe Cities Service with a lesser in order to give up the bigger?

Oh, they come up with a very dynamic question. They say:

"Was Jones reached?"

[fol. 11531] If it were Walter Winchell's column, I would say that would be entitled to blackface type. But what does it mean, "Was Jones reached?" Are we talking here about Mr. Jones' private reasons for doing what he did or are we talking about whether he brought Cities Service into a conspiracy? Where is there an allegation supported by a shred of evidence that Cities Service conspired with anybody to do anything? But we have been asked some questions, your Honor, and, like the Frenchman, I would say just for the sport let's examine some of these questions.

Question No. 1: Are there any documents among those not produced by Cities Service which indicate that the Iranian negotiations and the Kuwait negotiations crosse

paths? Were stalemates avoided or better terms offered in Kuwait as an inducement to give up Iran?

The first answer, of course, is that it makes no difference. Cities Service owed no duty to the plaintiff to prefer Iran over Kuwait or to prefer Kuwait over Iran. But actually as a fact it couldn't be as the plaintiff says because the final contract we avow under oath and they have not challenged has exactly the same terms as they offer which was con- [fol. 11532] summated and the acceptance which was consummated before Waldron appeared on the scene.

Now, it can't be that some of those papers would show that Gulf threatened to take away Kuwait if they didn't abandon Iran because you cannot threaten somebody with denying him 20,000 barrels a day unless he gives up 600,000 barrels a day. What kind of a threat? They now say that Kuwait is the lesser. Besides, threats don't make conspiracies.

The second question they put:

Was the right to participate in the Consortium a valuable right? Of course it was a valuable right. You don't find all the American independent companies scrambling and scrapping and fighting and haranguing and arguing to get in if it is not a valuable right. Why do you suppose Cities Service struggled to get participation in the Consortium? They must have thought it was a valuable right. I don't know whether it has turned out to be valuable; but, that everybody thought it was valuable, of that there can be no question.

But was it the price to pay off Cities Service? Again, there we have the facts of history. The Consortium happened long after the dry hole negotiations had stopped. The [fol. 11533] participation in the Consortium was never attended by the defendants; it was the State Department. Was the whole State Department, was the Attorney General, was the National Security Council, all of whom cooperated in creating the Consortium, were they all corrupted for the sole and single purpose of buying off Cities Service from

doing business with "moth" Waldron? And it is interesting to suggest here that they say "In the palm of our hand lay a hundred per cent of the Iranian oil industry and we gave that up in exchange for a 45 hundredths of 1 per cent interest in Iranian oil."

The question addressed to Mr. Jones is irrelevant because the true question is:

Did Cities Service conspire with others to boycott the plaintiff? Of that there is not one line of proof. Indeed, the only answer given to every question designed to elicit the answer to that inquiry by the plaintiff Waldron is: I don't know. I had no evidence when I framed my complaint. I have no evidence today. But, who knows, maybe some day I am going to find some. Waldron doesn't even claim that Jones agreed to do anything.

[fol. 11534] In rapid questioning sometimes a little truth emerges. Let me read you a question and an answer which appears on page 6106:

"Q. You say in your complaint 'by these acts.'"

You remember the allegation in the complaint:

By these acts Cities Service joined the conspiracy.

"Will you give me a bill of particulars of these acts that you mention in the complaint?"

"A. What do you mean, Judge, a bill of particulars?

"Q. Just state which are the acts that you refer to. Do you mean more than the acceptance of the contract?

"A. The negotiation of the contract and all of the terms were agreed upon, and the way that they were agreed upon and the reason for agreeing upon them"—he is talking about the Kuwait contract—"that Cities Service would be deterred from taking Iranian oil by the acceptance of this contract with Gulf for oil from Kuwait."

By presuming that Cities Service was going to be deterred from buying Iranian oil because they bought Kuwait oil, I still don't see the basis for an accusation of a participation in a conspiracy to boycott Mr. Waldron.

[fol. 11535] Now, your Honor, questions, as I said, don't make a complaint. The plaintiff must have the answer and it must be supported by something. It must be supported by some evidence, as Judge Weinfeld said in the Moran case, and it takes more than mere desire on the part of the plaintiff to entitle him to ask rhetorical questions before his complaint is dismissed.

They ask another question:

Did Cities Service have a hand in causing Richfield to drop the plaintiff so precipitously? That is a perfect illustration, your Honor, of the utter irresponsibility which permeates the plaintiff's relationship to Cities Service in this complaint. He says nothing about Richfield in his complaint. He did not accuse Cities Service of having conspired with Richfield against the plaintiff. But, in the course of his deposition, on a half dozen different occasions, as I would put him a question, he tried to see if maybe he could pin something on Cities Service. I won't take the time now to point them out, but it is there and I hope your Honor will read this deposition. It would well repay your effort. It won't take so very long. It will save many weeks and months of trial.

[fol. 11536] Richfield is a company in which Cities Service has a stock interest, as I have indicated. The plaintiff tried to sell oil to Richfield as he tried to sell it to every company in the United States, and Richfield did not buy from him. So he sits there on the witness chair and speculates:

Maybe Cities Service was the company that induced them not to buy oil from him. By all that is sacred, does that entitle a man to bring an action? A man is run down on the street, so you bring the next bystander into court and say: "Well, maybe you had something to do with that automobile." Does he assert that he has a shred, a scintilla, a thread of proof to suggest that Cities Service induced Richfield not to buy from him? Not a word. But a question, in his judgment, does duty for an allegation. I don't know

why he didn't ask him whether Cities Service had a hand in causing the Korean War or, maybe, this misadventure that we had in Russia on Friday.

There is an interesting paragraph in the plaintiff's brief which is perhaps as good a clue as any to the misconception which underlies the plaintiff's approach to this case, and with your permission I would like to call your Honor's [fol. 11537] attention to it. It is on page 15 of Mr. Lane's brief, and it reads as follows:

> "Rule or no rule, elementary principles of common justice would seem to dictate that when an individual has been put through what this plaintiff has had to endure, when he has secured through his own initiative and resourcefulness a valuable contract and has then introduced one of the great oil companies to an undreamed of opportunity only to have the door slammed in his face and the exploitation of his contract frustrated, the very least that he can expect when he brings to the bar those whom he believes have opposed him, betrayed him, is that he will have an opportunity to inquire into their actions before his case is thrown out."

I respectfully suggest that is just utter nonsense. First of all, I don't know what my good friend, Mr. Waldron, has endured. But, if he has endured anything, it was not at my hands. He sued Standard Oil of New Jersey in a big lawsuit, so Standard Oil of New Jersey examined him. He sued Gulf, et cetera, and each one of those companies examined him because he brought suit against them. I never made a motion to examine him. I only cross-examined him [fol. 11538] and, when we did, we examined him for exactly four and a half days, and I suggest, your Honor, that when a man sues my client for $109 million I not abusing him when I examine him for four and a half days in succession, one day after the other. I did not bring him in from Denver

time after time. So I don't know what he is talking about when he says what he has endured.

If he means that he has been subjected to delay, your Honor won't be deceived by that. The last thing in the world that the plaintiff wants is to bring this case on for trial in a hurry. He can't try this case until the Government has tried its case because he hasn't got the proof that he hopes the Government has. So, while theoretically there is all this shouting and murmuring and grumbling about "Look how long you have been examining me," the actual fact is that that has served the plaintiff's purpose very well because otherwise he would have been on trial now. Where would he be if he were on trial? He would be out on the sidewalk because he hasn't got the proof. But, in any event, Cities Service has not caused him to endure anything, and Cities Service has not caused him to suffer. But, even if it had, does it mean that because the defendant has examined [fol. 11539] the plaintiff, therefore, although the plaintiff hasn't got a case, hasn't got a complaint that a lawyer would certify, hasn't got a proposition to hang his hat on, he is entitled to examine everybody on the defendants' side because otherwise it isn't fair play? Well, that is the way you play potsy on the sidewalk on the East Side, but that is not a courtroom operation that I have ever heard of.

And I don't know what is meant by "rule or no rule." I won't work in this courthouse with no rule. I want a rule, and my good friend the plaintiff wants a rule. We are here to observe a rule, and the rule that I am interested in is Rule 56 which says that I am entitled to summary judgment when the plaintiff's case is such that there isn't a single genuine or material issue to try.

I have already indicated to you, your Honor, that the cases in this circuit and in this district do grant summary judgment, that the fear which encompassed some of the judges for a few months after Arnstein v. Porter has now been dissipated, that it is a great and important remedy, and particularly, your Honor, I call your attention to the

comment of Mr. Justice Black. I mention Mr. Justice Black [fol. 11540] because, unlike Judge Frank, he is the great advocate of the jury trial, if you recall my psychoanalysis of Judge Frank, and Mr. Justice Black says in his opinion in the United States Supreme Court, U. S. v. Employing Plasterers Association:

> "... at any time a claim is frivolous and expensive full-dress trial can be avoided by invoking the summary judgment procedure under Rule 56."

And I need hardly refresh your Honor's recollection that the subject of the so-called big case has received a great deal of attention among your colleagues and yourself in this court and in the other district courts of the United States, and many conferences and committees have been appointed and examined that problem and they finally published a thing called "Handbook of Recommended Procedures for the Trial of Protracted Cases," and I would like to quote this language from there, page 28:

> "The judge's efforts may well be directed first to eliminating false issues. Footnote: The summary judgment procedure is available to avoid expensive trials of frivolous claims."

[fol. 11541] I think this Court has a perfect right to say to the plaintiff: You declared under oath on your deposition that the only reason you made the defendant Cities Service a defendant in this case is because of what you thought happened with respect to Kuwait, you thought that that deal was made in August and September of 1952, and because of what you thought happened in the Consortium because you thought that the defendants invited Cities Service to become a member, and that is why you brought this suit, and so you stated under oath. Now you have discovered that you are mistaken: In decency and in good conscience you ought to withdraw your complaint and for your failure

to do so we think that the motion for summary judgment ought to be granted.

Now, your Honor, I may want to put in a little supplemental brief in response to the plaintiff's brief, and I will see at the conclusion of the argument where I need to renew that request.

The Court: We will take a ten-minute recess.

(Recess.)

[fol. 11542] ARGUMENT BY MR. LANE

The Court: Mr. Lane, you may proceed.

Mr. Lane: May it please the Court, I shall address myself in the beginning to Judge Rifkind's argument, and I shall endeavor to be a good deal briefer than he was.

I do not think that it adds anything or that it aids your Honor at all in reaching a decision on this motion to have a jury speech made to you in which the plaintiff is described as a drummer or as moth or an irresponsible person, and as Judge Rifkind was playing upon the fact, this is a small business man from Denver, Colorado, who undertook to inject himself as an interloper into the oil business, and I was reminded of Judge Wyzanski's reaction to the plea by the United Shoe Machinery Company in the antitrust case brought by the Government in which the United Shoe Machinery Company said that they needed a vast aggregate of wealth in order to effectively conduct their research in the processes for manufacturing shoes, to which Judge Wyzanski said, "Here come a small Greek, who doesn't have the money that you have, doesn't have the experience that you have and consequently doesn't know that he can't glue soles to uppers, so he goes ahead, and he does it." [fol. 11543] So in this lawsuit that we bring before you, we have a man who did not know better than to go to Iran to get a contract for Iranian oil. It does not seem to me that that is an indictment of him. It seems to me that that is a credit to him rather than otherwise.

Also, Judge Rifkind speaks of the exploitation, the expropriation of oil in Iran as being some sort of an inter-

national brigandage. I remind the Court that Mexico expropriated its oil, that is, it nationalized it in the same way, and that Great Britain nationalized her coal mines. Where is the great distinction between the Iranian Government nationalizing its petroleum resources and England nationalizing its coal?

I am of the opinion that this motion for summary judgment is, in the words of Judge Learned Hand, in Bozant v. Bank of New York:

"Another mistake and attempt to dispose of a complicated fact case by summary judgment."

Notwithstanding that, we welcome it, because it seems to us that it illustrates better than anything else that we could think of, the plight in which the plaintiff—and I may say his counsel—are placed in this litigation.

[fol. 11544] We do not apologize for the action which we brought here. We do not accept the condemnation in Judge Rifkind's argument that we are in some way men of no integrity to pursue this cause of action. It is seriously brought. It has a serious basis, and we only want the opportunity prosecute it.

The situation, it seems to us, is the same as that which presented itself in Loew's, Inc. v. Bays, which was another antitrust suit, a civil suit, in which immediately upon the filing of the complaint, the defendants came in with motions of one kind or another and then interrogatories, and then on the basis of those interrogatories and before issue was joined, moved for summary judgment, and the plaintiff responded under Rule 56(f), saying that he should have the opportunity at least to inquire before the curtain is run down.

The motion was granted, and it was reversed on appeal.

We are precisely in that same situation on this antitrust case, for the reason that with their notices of appearances, each one of the defendants—I guess Judge Rifkind would [fol. 11545] correct me on this—but most of the defendants served notice contemporaneously with their notices of ap-

pearance that they would examine the plaintiff before trial, and at the same time they moved by order to show cause to prevent him from conducting his own discovery proceedings, and the plaintiff consequently has been unable to proceed in his character as a plaintiff from the moment that the defendants appeared in the suit.

Judge Rifkind refers to Mr. Justice Black's statement which he has quoted at the top of page 44 of his brief that at any time a claim is frivolous, an expensive, full-dress trial can be avoided by invoking the summary judgment procedure under Rule 56.

A full-dress trial can be avoided, I concede, but what is trying to be avoided here in this present posture of this lawsuit is not a full-dress trial. The attempt here is to prevent the plaintiff in this lawsuit from proceeding as a plaintiff to get the evidence. If it does not get the evidence before trial through the only sources where it might be thought to be available, then perhaps the motion could be made and perhaps the motion should at that time succeed.

But I call your Honor's attention to such decisions as [fol. 11546] that of your Honor himself in Austin Theatre v. Warner Bros. Inc., an antitrust case in which the plaintiff alleged that certain defendant theatres were in a conspiracy to restrain trade, and I call your Honor's attention to Judge Walsh's opinion in Breswick v. Briggs—that was not an antitrust case. That was a derivative stockholders' case. But in each of those cases it was obvious that in the first place, most of the telling evidence would have to come from the defendants themselves, and, in the second place even if you examined the defendants and they came in with plausible explanations for the reasons for doing the things that they did do, still where there is a great question as to why they did those things and what the reasons are behind their actions, that, then, is a question for a jury and not appropriate for summary judgment.

At the outset of his argument, Judge Rifkind sought to explain why Judge Frank had experienced the mental

aberration which he did in Arnstein v. Porter, and Judge Rifkind said that because of his affection and admiration for Judge Frank, he could only explain it as an unconscious mechanism of compensation for the fact that Judge Frank has been opposed to jury trial.

[fol. 11547] I call Judge Rifkind's attention now to the fact that in Arnstein v. Porter, Judge Frank suggested that if a jury had not been demanded in that case, it would be the better part of wisdom for the trial court to have empaneled a jury for an advisory verdict. So that in the very case that Judge Rifkind seeks to explain away, Judge Frank, far from compensating for his antipathy to a jury, was suggesting that a jury would be appropriate.

As I say, the attempt here is to cut this plaintiff off before issue is joined, before he has had an opportunity to take any depositions or to discover any documents himself, and even before the time within which he can amend his complaint has run out.

If you look at the complaint, your Honor—I am now referring to page 18, the subdivision which refers to Cities Service—you start first of course with the allegation that there is an international oil conspiracy to monopolize the Middle East oil. That has been alleged not, I suggest, frivolously by the United States Government. As you know, the allegations on that head have been incorporated in the Waldron complaint. It is not denied, and that is the thresh-

[fol. 11548] old of this litigation.

We don't, of course, as Judge Rifkind implies, pretend that this whole international conspiracy was aimed at Mr. Waldron. We don't infer that he has some persecution complex that motivates this action, but we do say that there was a conspiracy to monopolize trade in Middle East oil, and the gravamen of our complaint against Cities Service is that it joined that conspiracy.

The allegations leading up to that and incorporating it begin at page 18 of the complaint, I read from paragraph 6:

"Prior to 1952 Cities Service had been unable to obtain a source of crude oil in the Middle East because of the aforementioned allocation agreements."

That is not denied, your Honor. That is an allegation that Cities Service tried to get into the Middle East and was excluded by the cartel. That is not denied, because there is no denial of the complaint at all and because it is not referred to in the moving affidavit, so you will take that for this purpose as conceded.

Continuing:

[fol. 11549] "Cities Service indicated to plaintiff a great interest in purchasing his entire supply and obtaining a managerial contract for all Iranian oil exploitation and production from the Iranian Government."

That is not denied in Mr. Hill's affidavit, and of course it is not otherwise denied, and I take it that it must be accepted as proof for purposes of this motion.

"It was contemplated that in return for its services Cities Service would receive payment in oil, thus assuring it a crucially needed source of supply."

That is not denied, and the fact is that the documents which are produced here in court from the Cities Service file indicate that it could not possibly be denied, because Cities Service was crucially interested in obtaining Middle East oil and was looking to a Middle East source at the time.

"Cities Service asked if plaintiff would be able to obtain an invitation from the Iranian Government to itself"—

that is, to Cities Service—

"requesting that Cities Service inspect the Iranian oil [fol. 11550] installations for the purpose of determining whether they could be profitably reactivated."

That is not denied. It is conceded. The invitation itself, signed by Prime Minister Mossadegh is attached to the

opposing affidavit, and I remind your Honor that this invitation from Prime Minister Mossadegh, which Judge Rifkind referred to in only one sentence, was the subject of days and days of negotiation before Waldron went to Iran with his associate, Nelson, to seek it. But it was impressed upon Mr. Waldron that it was of the utmost importance that that invitation appear to be spontaneous from the Government of Iran to Mr. Jones, the president of Cities Service and that elaborate precautions were taken to conceal the true origin of that invitation.

In point of fact, the invitation was written out in the Cities Service office before Waldron and Nelson went abroad. They took it with them and, as the testimony indicates, when they reached Iran, there was a momentary revolution in progress; Prime Minister Mossadegh had been deposed, but Waldron was assured that if he would stay and wait it out, this would be a temporary affair. He stayed, and it blew up in about ten days, and then he got [fol. 11551] into the hospital to see Prime Minister Mossadegh and told him what he wanted. The Prime Minister recognized this as a chance to break the blockade which had been throttling Iran ever since the previous year. He asked that the invitation be put into French, which it was, and he signed it. Waldron brought it back, taking, however, a copy for himself, which we now have in evidence.

So it is not denied that Cities Service was looking for that invitation, and I don't think that it adds anything to the argument to condemn Mr. Waldron as looking for a "fast buck." I think W. Alton Jones was looking for billions of fast bucks, and I don't think that to put it in that language is to condemn either of them. But I think that both of these men, Waldron and Jones were intending a business proposition and that Jones was not going to Iran simply out of some patriotic motive, and if you will consider the many conversations which are recorded here between Jones and Waldron and others about Jones

not being afraid of the British lion and about his suggestion that if they made trouble for him, he would pour the Iranian oil down their throats and what-not—those things are not denied at all, and they show that Cities [fol. 11552] Service was considering undertaking a task of enormous magnitude, that is, to reactivate the Abadan refineries, which are the biggest in the world, and take over the whole Iranian oil industry, and, if they had, Cities Service would have had to fight the international oil cartel, just as Waldron found that he could not sell his oil because of the opposition of that cartel.

It was a most serious undertaking, and that was the reason in large part for the secrecy in the manner in which it was undertaken.

It says in the complaint:

"On July 26, 1952, plaintiff in audience with Dr. Mossadegh obtained the Prime Minister's written invitation addressed to W. Alton Jones, president of Cities Service."

That is not denied.

"Jones accepted the invitation and on or about August 16, 1952, together with plaintiff and numerous technical assistants from Cities Service left for Iran."

The testimony shows that he took with him his production man, his head refining man, his head transportation man, and they were in Iran for, oh, I guess four [fol. 11553] weeks. If they went over there on August 16, and Jones was being interviewed by the press in Teheran on September 19, they were there for a month. They weren't there for their health. They were there on business, and it was very important and serious business.

None of this is denied. It is not alluded to in the moving affidavits, but neither is it denied.

"There, after a full inspection, Jones determined that the installations could be reactivated. He proposed to the National Iranian Oil Company that over the course of

years Cities Service would exploit and manage the Iranian resources while undertaking to train Iranian technicians in the United States and building a tanker fleet for the Iranian Government so that ultimately the Iranians could exploit and manage for themselves their valuable oil resources."

Not any of it is denied. Not any of it—I was about to say is capable of denial. I don't know what the capacity is for denying it, but the fact is it is not denied and must be taken as true for the purpose of this motion.

[fol. 11554] The allegation goes on:

"Learning of Cities Service's intention to force itself in this manner into the Middle East oil complex, Gulf and Anglo-Iranian, during late August or early September, 1952, conspired to and did offer Cities Service and Cities Service did accept a vast long term supply of Kuwait oil at a price far below the posted International Gulf of Persia price, to wit: a 12-year contract for 90,000,000 barrels of oil at $1 per barrel, or the equivalent, approximately, of $7.40 per metric ton at a time when the posted price was approximately $12.89 per metric ton."

That is not denied, nor is it, so far as I know, capable of being denied that Gulf and Anglo-Iranian conspired together. The contract which was offered is fully set forth in, I think, Exhibit 29 of the documents which have been presented.

But I take serious issue at this point, and it seems to me a major defect in Judge Rifkind's argument with his statement that that contract had been reached, that the agreement had been reached between Cities Service and Gulf before they ever heard of Waldron.

[fol. 11555] I recall his language. He spoke of an offer and acceptance before that time. I think also he criticized our answering brief, where we referred to the increasingly attractive nature of the offer made by Gulf to Cities Service.

Now, if you will look at these documents which have been offered by the defendant in support of its motion, you will find that they did not reach an agreement at any time prior to January 1953.

I agree with Judge Rifkind that they discussed an agreement going way back to 1948, and it was a very complicated agreement, and the terms took a long time to thresh out, and the formula for it, for the price for the oil was quite a while in evolving.

The cold fact is that when Waldron walked into the Cities Service office with his invitation from Prime Minister Mossadegh, Cities Service was not bound to Gulf, and Gulf was not bound to Cities Service, and the fact is also that the final contract as signed in January 1953 has many important terms in it which were not contained in the memorandum of agreement—or not the memorandum of agreement, but the draft of the contract which was current at or about the time that Waldron came into [fol. 11556] the Cities Service office for the first time.

So if your Honor looks at those drafts and then looks at the contract in final form, as adopted in January 1953, you will find that there were very serious questions, for example, about how much crude oil Gulf could store and how much in refined products Gulf could store at its Philadelphia refinery, where Kuwait oil was to be refined, and what the rate of delivery of that oil would be and what the charge would be for delivering the oil, whether into tank cars or into trucks or into barges or by pipe line or what it was—all of those things were worked out on a basis apparently acceptable to Cities Service, and so, I suppose, acceptable to Gulf. But long after Jones came back from Iran. They were not in the draft agreement prior to the time he went.

So it seems to me that what we have said in our reply is beyond dispute, that at the time when Waldron came to Cities Service with the invitation, and Jones went over to Iran with his team of experts to look at the installations in Iran, Cities Service had a choice: It could at that time

have undertaken to reactivate the Iranian oil industry and to build or charter or obtain otherwise tankers to transport [fol. 11557] that oil, and it would then also have had to undertake to establish the facilities for marketing that oil throughout the world, or it could press to a conclusion its negotiations with the Gulf Oil Company and make a deal for Kuwait oil on a 12-year basis, which would also cover refining and transportation.

It was a hard choice, perhaps, to make, because, as Mr. Jones said in Paris on the way home, "Gerry, this is not millions. This is billions, or else it's a dry hole."

If Jones had gone ahead in Iran, he would have had to fight the oil world. He would have had to oppose the international cartel in the Middle East. He would have had to take on the opposition which blocked Waldron, and even the great Jones, with all his bombast about pouring the Iranian oil down Willie Frazer's throat, must have thought long and hard before he gave up that opportunity for those billions of dollars.

Now, don't forget, too, that before Waldron over to Iran with Jones, there were long and serious discussions about the compensation that Waldron and his associates were to receive. At the outset there was talk about a million dollars to secure this invitation. That was in addition to getting 1 to 2 cents a barrel on oil and products. [fol. 11558] But at the end there was simply a gentleman's understanding that the compensation would be negotiated within the range of 1 to 2 cents on the oil and on the products after Cities Service had reached an agreement with the National Iranian Oil Company which would fix its interest in the Iranian oil picture.

So don't, I beg your Honor, be deluded by the thought that this is simply a patriotic junket by Mr. Jones, who was going over to Iran to save the Western Hemisphere from the crisis which the nationalization of Iranian oil resources had provoked. This was business, and it was business which Jones didn't choose to share with the cartel before he got well into it and knew what he could do with it.

Now we go on in this complaint, and we say:

"At this time and by these acts Cities Service, without the knowledge of plaintiff, entered into combination and conspiracy with the other defendants and in furtherance of defendants' scheme both are for further negotiations with plaintiff and the National Iranian Oil Company and refused to enter into any contract or arrangements with reference to Iranian petroleum."

[fol. 11559] That is not denied and must, I suggest, be taken as proof for the purpose of this motion.

You will read Mr. Hill's moving affidavit here in vain to find anything which he says that the plaintiff knew about the negotiations which were going on with Gulf at the time when he took Jones and his party over to Iran, or you will not find in the affidavit any denial that Cities Service entered into combination and conspiracy with the other defendants.

You will not find any denial that in furtherance of defendant's scheme, Cities Service broke off further negotiations with plaintiff and the National Iranian Oil Company and refused to enter into any contract or arrangements with reference to Iranian petroleum.

What has happened here, I suggest, as betrayed by Judge Rifkind's statement, was that when he read the complaint, his mind jumped to the conclusion that what the plaintiff was trying to allege was that Gulf bought off Cities Service at the crucial moment when a contract was about to be concluded between Cities Service and the National Iranian Oil Company.

Now, that is not a bad conclusion on Judge Rifkind's part, but it is not alleged. If I were asked to amend the [fol. 11560] complaint now so as to state specifically that what we are alleging was that Gulf bought Cities Service off, I would not hesitate to allege it. I could say that that allegation would not be negated by the documents which have been submitted leading up to the final Kuwait con-

tract in January 1953, but I would say this: That we don't allege in the complaint that Gulf bought Cities Service off and that is equally valid would be that Jones, through the perfecting of his hold upon the Iranian oil industry, could force his way into the Middle East cartel, from which his company had long been excluded, by threat on his part that if they didn't let him in now, he was going to take the whole Iranian oil industry from the Anglo-Iranian Oil Company.

But what we say in the complaint is neither one nor the other. What we say in the complaint is that the plaintiff had this contract—and there is no question about the validity of his contract; nobody denies that he had the 15 million-ton contract at more than $4 under the posted Persian price for the first 3 million tons and $2 for the next 12 million tons.

What we say is that in addition to that contract, which Cities Service would have taken over if it had made a [fol. 11561] deal with Iran, Waldron introduced Cities Service to the opportunity to become the biggest oil company in the world, and then something happened. It was, we say, in the palm of Cities Service's hand. We believe that it was in the palm of Cities Service's hand, or we wouldn't say so.

Then Waldron left Iran and went to Paris. Jones and his team went to Kuwait, and when they met again in Paris something had happened, because for the first time Jones said, "Perhaps this is a dry hole."

So that either Gulf bought Cities Service off or Cities Service forced itself into the Middle East cartel as a partner of Gulf in Kuwait, Gulf itself being a partner of Anglo-Iranian, or something of that nature happened.

But in an antitrust case, it is no indictment of the plaintiff's complaint that he has to pose this type of question. Of course, things will not appear to be—a conspiracy is not to be found upon the face of the documents, and all we are saying here is that the documents which are pre-

sented are a selected group, which are inconclusive when considered with reference to our allegation that Cities Service joined forces with the cartel, making a precisely 180- [fol. 11562] degree turn at the very point when Cities Service had the choice of taking over the Iranian economy or the Iranian oil industry.

Now we go on and say that as a sequel to this, Cities Service had the right to participate in the Consortium.

It is not as simple as Judge Rifkind would make out, namely, that the Consortium excluded Cities Service and that Cities Service had to fight for the right to get a participation in it.

We don't know at this point what understandings there were at the time when the Consortium was negotiated among the five American Majors who have been sued in the civil antitrust case by the Government.

All we do know is that they established some standards by which the others might participate up to 5 per cent. We don't know whether Cities Service was consulted or not at the time when those standards were made.

We don't know whether those standards were such that nobody but somebody like Cities Service could get in, and if Cities Service had the assurance that the standards [fol. 11563] would be such that it could get in if it would give up this opportunity which it had to take over the Iranian oil industry—

The Court: Mr. Lane, I am going to interrupt you to declare a luncheon recess until 2 o'clock, and at 2 o'clock I will be very happy to have you continue your presentation, following which there will be rebuttal if desired, and sur-rebuttal if desired, and then we will take up the question of further memoranda, and the Court desires to put some questions to counsel, having held the questions during the presentations of counsel.

(At 1.50 p.m. a luncheon recess was taken.)

[fol. 11564] Afternoon Session

The Court: You may resume, Mr. Lane.

Mr. Lane: Thank you very much, your Honor. I will be quite brief.

I was saying when we adjourned for luncheon that the cartel companies themselves fixed the definition of a qualified participant to come into the consortium up to 5 per cent. It may very well be that that was one of the things of which Cities Service was informed before relinquishing its opportunity to go ahead in Iran, so that in that sense the cartel companies were definitely admitting or holding out the other companies that might participate in the consortium.

Then, too, as we show in our papers, the umpire in this situation was Price, Waterhouse, which, as you know, is probably the largest accounting firm in the world, I guess, and does work for these big companies, so that it didn't exactly seem to us to be an arm's-length situation.

I think that to put this in perspective, I would say this: that what we have here, by contrast to what the defendant has up until this argument called the touchstone de-[fol. 11565] cision, namely, the Griffin decision, is something based upon a long period of close working relations toward the realization of an ambitious plan by the plaintiff and Cities Service, in contrast with the racial, religious and other prejudices upon which Mr. Griffin based his claim that summary judgment could not be taken against him.

What we have here is an unexplained dramatic shift from what appeared to be almost a fait accompli to what appeared to be a lack of any interest even to discuss the matter, followed by a period of almost two years' secrecy as to what really did happen.

Now, I am as unwilling as the next to dedicate my life to a forlorn cause. I am as interested as anyone in this room to ascertain precisely what did happen, and I am perfectly confident that there is a valid basis for according the plaintiff that right and opportunity, and I am per-

fectly certain that if at the present stage of development of the procedure in this case summary judgment were to be granted in favor of Cities Service, finally terminating plaintiff's claim against Cities Service, since the statute of limitations has run on that claim now, reversal in the Court of Appeals would be inevitable, and that we would [fol. 11566] then find that we had been engaged in a time-consuming, expensive undertaking for no purpose.

We cannot tell until the plaintiff has had some opportunity to inquire of Mr. Hill and Mr. Jones and other Cities Service personnel whether these documents that are presented on the Kuwait contract are all relevant documents or whether they are supplemented by collateral agreements or understandings or memoranda, and even if we had not a pre-selected group of documents but had them all, still I submit that in this circuit, in any event, we would still be entitled to a trial to ascertain the reasons behind those documents for the course of conduct which those documents indicate.

Now, if we had all of those documents, it is possible that we would have a different concept of the case now, but it does not seem fair to me to be told, as I was this morning, that upon the presentation of a selected group, if my client was an honorable man and a man of integrity, he would have withdrawn his claim. If he had all the papers, perhaps he might have withdrawn his claim—I do not speak for him in that regard, because he has not had all the papers—but I say for my own part that when [fol. 11567] as much time and effort have been put into something of this magnitude, I would not advise him to withdraw his claim upon presentation of that slim group of papers.

Judge Rifkind suggested that he was for a rule, that he would prefer to be governed by a rule and that my statement at page 15 that, rule or no rule, his motion should be denied, was not according to his way of doing things.

Of course, if you would look at page 14 of my brief, which immediately precedes the top of page 15, where I

said, rule or no rule, you will realize that I was talking about Loew's, Inc. v. Bays, at which the same thing happened as happened here, namely, that the plaintiff in an antitrust case was denied the right to take any depositions or conduct any discovery at all, and yet the motion for summary judgment was granted against him and reversed because of Rule 56(f), which in that kind of situation indicates that the Court has discretion to continue the motion pending the discovery by the plaintiff.

What I meant when I said, rule or no rule, was simply that even if there were no Rule 56(f), when the plaintiff comes into court, as this plaintiff does, and has been put [fol. 11568] through what this plaintiff has been put through, elementary principles of common justice would indicate that before he is thrown out of court he should have an opportunity to inquire, and I did not mean by my reference to what he had to endure simply that he had had to endure examination before trial; of course, he has had to do that; I am not complaining about that; and it is oversimplifying it again for Judge Rifkind to suggest that all this plaintiff has had to endure at the hands of Cities Service is four and a half days of examination before trial. What this plaintiff endured at the hands of Cities Service was that he was led into a trip to Iran; he was promised in effect an incredibly valuable contract, and then he was in a sense ejected from the Cities Service family of which he had been assured he was a member, with no explanation whatever from that day to this, on the predicate that there was a cartel, an international oil cartel, and that Cities Service made common cause with him up to the point where it shifted its allegiance and interest to the other side of this cartel struggle, and that these facts cannot be denied—we say that at the very [fol. 11569] least, before his claim is terminated against him, he should have the opportunity to inquire.

We think that of all the circumstances, that result is most clearly indicated in the Second Circuit. Therefore, our

suggestion to the Court, in conclusion, is that the motion either be denied outright as impossibly premature or that it be continued pending the giving of an opportunity to the plaintiff under Rule 56(f) to conduct his own discovery proceedings, and we urge upon the Court the importance of the latter alternative, which brings in the fact that the principal actors in this controversy are all men of advanced years, who will not be available if we have to wait another two years before we examine them.

REBUTTAL BY MR. RIFKIND

Mr. Rifkind: What I shall say will not be organized very well, because I have just jotted an occasional word to serve as a reminder of some things that Mr. Lane said with respect to which I wanted to comment, so I hope your Honor will bear with me.

I suppose I should apologize for what one judge of this court once called the lusty practice of the law, but I happen to be devoted to the lusty practice. I like to make my [fol. 11570] points with the enthusiasm which I actually have for the proposition that I am asserting. I did not think I was making a jury speech. If Mr. Lane will do me the honor sometime to sit in when I address a jury, he will then will see what I do to a jury. It is an entirely different method of address. But I really did not think that I trespassed.

I think that the propositions I asserted were the kind that were very properly addressed to the Court and not to a jury.

I should like to call your Honor's attention to one or two quotations. The first I shall read from Banco de Espana v. Federal Reserve Bank, Judge Leibell's decision, in these words:

> "This Court will not base its decision on these motions"—

these were motions for summary judgment—

"on suspicions, but on facts. Rule 56(c) of the Federal Rules of Civil Procedure requires the assistance of a genuine issue as to a material fact on which to base a denial on defendant's motion for summary judgment. The same is true under Rule 113 of the New York Rules of Civil Practice."

[fol. 11571] And the citation follows.

"In my opinion the suspicions advanced by plaintiff's counsel serve to create only a feigned issue."

I think that that is a good text with which to open my remarks with respect to what Mr. Lane has said. He has again advanced some feigned issue—"maybe, perhaps, I don't know."

Then I call your attention to a quotation by Judge Weinfeld, much more recently, in Morgan v. Sylvester, reported in 125 Fed. Supp. at page 380, where he says:

"Fully recognizing that conspiracies are rarely proved by direct evidence, nonetheless some evidence, however slight, must be offered of a fact from which a reasonably-minded person can draw an inference of the alleged conspiracy . . . . Rules 56(e) specifically states that affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify in the matter stated therein. The absence of fact is not cured by vituperation and [fol. 11572] the indiscriminate use of opprobrious adjective. Neither is it cured by mere assertions unaccompanied by facts which would be admissible in evidence upon a trial."

It goes on:

"A trial is required only when there are genuine issues of fact, and the opposing party is not entitled to have the motion denied on the mere hope that at the

> trial he will be able to discredit the movant's evidence. He must at the hearing be able to point out to the Court something indicating the existence of a triable issue of material fact",

and so on.

Now, your Honor has heard my good friend's argument. I have not heard him call attention to any issue of fact. In a couple of places he says, "I allege so and so and it has not been denied."

Into that kind of a trap I usually do not allow myself to be enticed. My burden on a summary judgment is to avoid issues, to show that on the acquiesced-in facts, on the unquestioned facts, there is no triable issue.

So it may be there are some trifling allegations made in [fol. 11573] the complaint which I have not taken the trouble to deny because they are not germane to the question of whether the defendant Cities Service is entitled to judgment as a matter of law.

Now, one or two things that I want to comment on.

First, some of my good colleagues representing other defendants have suggested to me that possibly something I have said may have given rise to the suggestion that the original members of the consortium were excluding anybody by some arrangement. I don't know that to be the fact. I do not say that it is the fact. I don't know what the fact is, and I assume it was not the fact, because the whole thing was done under the bright light of supervision of the State Department and the Department of Justice. But if anything I said might lead somebody to such a conclusion, I would like to withdraw any such suggestion.

You heard a question put: Why did we buy oil from Kuwait? Your Honor, that looks like a very pertinent question, but you might as well ask me why did we buy oil from Oklahoma, or why do we buy oil down in Pennsylvania or some other places?

The fact of the matter—and I don't think Mr. Lane will [fol. 11574] contradict me on this—is that the Cities Service system, the whole system of companies which constitute the Cities Service family produce only somewhere about 40 per cent or a little more—45 per cent of its market requirements. Inevitably it must buy the other 55 per cent from whatever sources it can find. It buys oil every day of the week, day in and day out, and the record so shows. Mr. Waldron knew it. He said they were buying better than half their oil, at page 6166 of the record. So to ask why we were buying oil from Kuwait—we were buying because we needed oil to satisfy our requirements. We bought oil all over, all over the United States and other parts of the world.

But if the theory is that the ability to ask this question, why did they buy oil from Kuwait, entitles the plaintiff to prosecute this action, then it seems to me, your Honor, that we have been unwarrantedly selected for this honorable role of being the defendant in this case, because the same should be true of every other marketer of gasoline, of oil products in the United States, each and every one of whom buys oil every day, and is he going to say that each one of [fol. 11575] them is a putative defendant who has to come in here and justify his conduct, either because he did or did not want to do business with Mr. Waldron?

There were times, your Honor, when I was not sure whether Mr. Lane was trying to justify his complaint in this antitrust action or whether he was abandoning that course on formulating in his mind, consciously or unconsciously, a cause of action for a finder's fee or a broker's fee or a commission.

He spoke of and he read to you in rather well phrased language about how Mr. Waldron had knocked at Cities Service's door, and thereafter had introduced them to the greatest opportunity of a century. Those are the words that usually are to be found in a complaint in which the plaintiff is seeking commissions as a finder or a promoter.

Now, I assume that if Mr. Lane had been able to frame a complaint which would entitled his client to recover under that theory of the law, he would have done so. I assume that he didn't because he couldn't. But whether he could or he couldn't, this is not the complaint that he framed in this action.

The last suggestion I heard disturbed me somewhat. I didn't think that I would hear that suggestion. I heard [fol. 11576] Mr. Lane say that what he meant when he used the language that the plaintiff had endured much at our hands—he meant that we led him into a trip to Iran. We led him into a trip to Iran?

In this blue book, your Honor, Exhibit 1 on our motion for summary judgment, you will find out whether we led him into a trip to Iran or whether he was knocking at our door, seeking to sell his wares.

The first wares that he offered to us for sale, according to his deposition, was an invitation from Iran to come to Iran, the price tag on which was $1,000,000 for the invitation. And when that was laughed out of court, some other arrangement was made.

But it could not be that the plaintiff has a contract claim against us, because he isn't suing on that. But if you are under any illusion that we took advantage of poor Mr. Waldron, I don't think that Mr. Lane will disagree with me when I tell you that he has been paid not only for his expenses but for any time he put in in behalf of Cities Service.

Mr. Lane tried to make a point that until the Gulf contract for Kuwait oil was actually executed, there was not a binding arrangement between Cities Service and Gulf. [fol. 11577] Your Honor will recall that great emphasis was placed by Mr. Lane on that aspect of his argument, and I am willing to assume now that although there was an offer and an acceptance long before, that the intention of the parties was to memorialize their agreement in some written form, and that that did not occur until the end of

that year or January of 1953, and that Gulf could not have sued Cities Service for breach of contract if they had not taken the oil or that Cities Service could not have sued Gulf for not delivering the oil before that date.

But, your Honor, we are not here passing upon an action by Cities Service against Gulf for breach of contract nor by Gulf against Cities Service for breach of contract. We must not lose track of the context in which that transaction is here used. The context in which it is tendered here by the plaintiff is that in August of 1952 or September of 1952, when, as he says, Iran was laid in the palm of our hand, we abandoned Iran and went off and bought Kuwait oil, and unless I am incapable of completely, utterly understanding the English language, the impression I have and the impression that I had from his complaint was that the Kuwait transaction was used as the means of dissuading [fol. 11578] Cities Service from going forward with Iran. In that context, it matters little whether the instrument was actually executed or not executed. As soon as it appears that as a matter of fact negotiations had been intensively carried out for a long time prior thereto and that the parties had reached a state of mind wherein they agreed with respect to the terms and that all that remained was to memorialize the agreement, that notwithstanding the fact that until such memorialization occurred there was no binding contract, it can no longer be asserted that that is a fact from which you can infer the existence of the Kuwait offer as a bribe to buy off a possible customer.

But even if there were, what is there to suggest that it was the instrument for the arrangement of a conspiracy to boycott the plaintiff or to boycott Iranian oil?

Mr. Lane said something to you about how serious the conversations were between Mr. Waldron and Cities Service and says that there was considerable discussion as to the compensation that Waldron would receive in the event that an arrangement was worked out whereby Cities Serv-

[fol. 11579] ice would undertake the management of the entire Iranian operation.

I will not take time to comment on it, your Honor, but if some time your Honor has an idle hour or a half hour and wants to read something that is quite amusing, I suggest that page 6168 of this deposition will reveal to you just how serious Mr. Waldron's testimony was with respect to that discussion.

Now, at a number of places, Mr. Lane said that our papers don't negate this or that or some other thing. Your Honor, of course my papers don't negate. If I were to come in here to negate, I wouldn't be here on a motion for summary judgment.

The question is not whether I negate anything or my papers negate anything. The question is: Has the plaintiff got the little shred of evidence which the courts say is necessary to entitle him to be here when his complaint is challenged by a motion for summary judgment as powerfully founded as the one that we have made here this morning?

I heard him say that nobody denies the validity of the contract between Waldron and the Iranian Government. Well, I can look around this room and see some very distinguished counsel who, if afforded the opportunity, would [fol. 11580] rise and in a loud clamor tell you that they challenge the validity of that contract.

But I am not here for that purpose. For the purpose of my motion it matters little. It matters not at all whether the contract be valid or invalid. I am not now trying to invite that issue into the case, because assuming validity, the plaintiff hasn't got a case.

When you add it all up, the total of what you heard Mr. Lane say was, "We don't know, maybe, maybe they used it to force themselves into the consortium; maybe in 1952 in August Mr. Jones said, 'Maybe if I will go through and take over this entire Iranian operation, unless you promise me that in the fall of 1954 you are going to get the Depart-

ment of Justice to approve a consortium, and you go to the National Security Council to establish that there is great national security interest involved so as to justify doing so, and you are going to get the President of the United States to invoke those powers that he has in order to make that possible, and you are going to get all those people that are in this Middle East to pick Price, Waterhouse & Company, and you are going to establish standards [fol. 11581] that will make it possible for us to get in, and you are going to so arrange it, so that when we are all through we are going to get 45/100ths of one per cent of the pie which is now lying spread out on the table before us' "—my mind recoils from that kind of exposition.

Perhaps my mind is not attuned to the subtleties of inference of which the plaintiff is capable, but I must say that I am unable to see the nexus, logically or rationally, between one event and the other, but even if there were a logical nexus, the answer is, as the courts have said, it is not enough for us to raise a suspicious question: "What have you got to show, written or oral, in your possession which justified you in serving this complaint which would warrant a court in permitting you to exercise the licenses of examination that are afforded to a legitimate plaintiff?"

Two years of secrecy—you heard the reference to that. I suppose what Mr. Lane meant to refer to was that the agreement was executed for Kuwait oil in January of 1953 and hadn't come to the attention of the general public until the end of 1954.

[fol. 11582] Well, it so happens that the contract by its terms did not require any performance until late in 1954. As I indicated to your Honor, a fleet of tankers had to be built in the interval. All kinds of arrangements had to be made. Why this private contract was newsworthy or why anyone should reveal it or not reveal it I don't know. There is no rule that says that Cities Service Company has to publicize every time it makes a contract for the purpose of oil. Not even the Securities and Exchange Commission

has any such provision. I don't know of anything—I know we have a truth in Securities Act, but I did not know that we have a disclosure in oil transactions act on the books.

Just why should Cities Service or Gulf have made this contract public until such time as it was a matter of general interest, and that was when it went into effect and oil began to arrive from Kuwait for the refinery in Philadelphia?

The last argument is Mr. Lane's personal avowal to you. He says, "Your Honor, I am certain that if you let me dig in here I will find something."

Well, there used to be a rule—I guess there is still a rule—that lawyers should not vouch for their witnesses. [fol. 11583] I don't think a lawyer ought to vouch for his unseen documentary material, because he does not know. What he is saying is, "Give me this fishing license. Didn't I serve a complaint? And I need a fishing license." And I say, "You are not entitled to a fishing license until you have legitimate complaint and a complaint which will not withstand the disclosure of a genuine issue of a material fact is not the kind of a complaint which pays off a dividend in the form of a fishing license.

Finally, the last argument was, I suppose, ad hominem or in terrorem: Beware. If you grant this motion, it is going to get reversed.

Well, your Honor, I haven't observed that kind of timidity in this court before, and I do not expect to see it now, and I am sure that it doesn't make any difference. As one judge of this court once said, "The Circuit Court does what it thinks is right, and the district judges do what they think is right", only it was put in more pungent language than I feel warranted in putting upon this record.

The fact of the matter is that of course I would not come into this court and ask you to grant an order which I had [fol. 11584] reason to believe would not stand the scrutiny of the Court of Appeals. I think that the decisions of the Court of Appeals warrant—indeed encourage—I can't say

"command," because, as you know, denials of motions of summary judgment are not appealable, so we don't know what the Court would have done in some of the cases in which summary judgment was denied.

But when I see that in the last five antitrust cases in which motions for summary judgment were granted, the Court of Appeals affirmed in three out of them, then I don't think that this in terrorem argument plays any part, and I shall not address myself to it.

Now, your Honor, instead of wandering off longer, I think I should better attend to the questions that you indicated you wanted to address to counsel.

REBUTTAL BY MR. LANE

Mr. Lane: May I reply to that very briefly, your Honor?

The Court: Yes.

Mr. Lane: Of course, no in terrorem argument was meant at all. I was simply trying to explain in a very brief compass what I thought the attitude of this circuit was. I am perfectly aware of your Honor's familiarity with the [fol. 11585] policy of the Second Circuit in that regard, because your Honor is the author of three or four decisions and published opinions which enunciated it.

At the outset of his rebuttal, Judge Rifkind made a point again of the alleged fact that the parties, Cities Service and Gulf, were in agreement long before Waldron appeared on the scene, and he said—I made a note—that there had been an offer and acceptance.

If your Honor would look at document 26, page 2, Article 17, there is a letter to Mr. Bartlett of Gulf from Mr. Hill of Cities Service in which he said:

> "This article still provides for a charge of 5 cents a barrel for loading into tank cars, truck transport or truck wagons, and 2 cents a barrel for loading into barges. These amounts are not agreeable to Cities Service."

It then says that this has to be negotiated out.

When you are dealing with millions and millions of barrels, a penny difference in this contract would be $920,000.

When, in document 27, a summary is drawn up by the [fol. 11586] Cities Service people, it is entitled "Summary of Proposed Gulf Contract." So that I say to your Honor again, there was no contract. There was no offer and acceptance. There was nothing binding at the time when Waldron secured the invitation to Jones to go to Iran and when Jones went there and spent a month in his inspections and negotiations.

Judge Rifkind has suggested that merely to discuss the purchase of oil with Waldron was to invite suit at Waldron's hands.

Of course, nothing could be further from the fact. Waldron offered the oil all over the United States for two or three years, and he has sued only the cartel companies and Cities Service, with which he had the unique relationship which I have described.

I, too, think it would be helpful to answer such questions as your Honor may have.

The Court: As long as you are on your feet, Mr. Lane:

Judge Rifkind said that the plaintiff has been paid for his services and time. Does that fact appear in the record before me?

Mr. Lane: You should pursue that fact in the record that we have here.

[fol. 11587] I will answer that in just a moment. I don't mean to encumber the Court with the whole examination before trial and 2000 documents. All I mean by bringing it here is that it can be available to your Honor. We will either leave it here or we will take it to our office and bring it back if you want to see some particular part of it.

Now, to answer your question directly, Waldron expressed a great disappointment—

The Court: Now, look: Without any preliminaries, can you answer the question of whether or not the plaintiff has been paid for his services and time?

Mr. Lane: No. The plaintiff has been paid a small sum of money which he estimated was his out-of-pocket, that is, his loss from his business and whatnot, for undertaking what he did at the time and the expenses that he put into it. It is a trivial amount of money compared to what we are talking about here, and it is not the basis for Judge Rifkind's motion here at all. It is not alluded to in his papers.

We are not talking about a release or anything like that.

[fol. 11588]

COLLOQUY BETWEEN THE COURT AND MR. RIFKIND

The Court: Judge Rifkind, you stated that the plaintiff has been paid for his services and time. Are those facts —assuming that they are the facts—in the record before me?

Mr. Rifkind: I think that they are disclosed in his own deposition, page 6347 et seq.

I think Mr. Lane will agree with me that he received $19,000, he and his associates, in addition to his expenses, and that it was designed, as he said in writing, to pay for his loss of time.

The Court: When was that paid?

Mr. Rifkind: Spring of 1953.

He also stated in his letter in which he accepted this payment that he had no other claims against Cities Service.

I am not asserting a release for this claim, your Honor, but this is the fact.

The Court: In any event, Cities Service recognized that he rendered services?

Mr. Rifkind: No question about it.

The Court: Was there an itemized bill?

Mr. Rifkind: No, sir. His expenses were itemized but not his services other than the amount that he stated represented his loss of time by being kept away from his [fol. 11589] food brokerage business.

The Court: There is no dispute about the fact that he had contacts with Cities Service?

Mr. Rifkind: None whatsoever. There is no question, as I indicated in my argument, that he met the Cities Service people, that he procured the invitation from the Iranian Prime Minister, that he accompanied Mr. Jones, or at least traveled to Iran at the same time as Mr. Jones did, and that Mr. Jones did speak to the Iranian officials and inspected the plants and operations. No question about it.

The Court: For purposes of the argument and for that purpose only, what are the unquestioned facts that you regard as not germane and that have been summarized by Mr. Lane?

Mr. Rifkind: First of all, you can take the complaint, and as far as Cities Service is concerned, everything right down to Kuwait certainly is not germane—

The Court: I just want to know what types are not in dispute so far as this motion is concerned and that you are willing to admit arguendo.

Mr. Rifkind: I don't know what Mr. Lane wants me to [fol. 11590] admit.

The Court: He said it is not disputed that Waldron had a contract.

Mr. Rifkind: Whether or not he had a contract I say is immaterial for the purposes of this suit, and therefore you can treat it either way as far as I am concerned.

The Court: All right.

Mr. Lane alleges that there was a complete turnabout of 180 degrees.

Mr. Rifkind: I don't know what that means. If you read his—excuse me.

The Court: I understood by that that he meant that whereas before a certain event took place, which Mr. Lane interprets or translates to mean joining the alleged conspiracy, Cities Service displayed keen interest in the Iranian deal, and that after certain events or a certain event took place, they were not interested.

Mr. Rifkind: Your Honor, let me give you what I understand the situation is, as alleged in the complaint.

The Court: What I am concerned with is the historic events, without editorial comment.

[fol. 11591] Mr. Rifkind: That is right.

Mr. Jones did go to Iran. He inspected the installations. Obviously he wouldn't have gone there if he weren't interested.

He stated in his release that he went there to try and find a solution for the Iranian oil problem. It is the news clipping that has been put in evidence by Mr. Lane. I accept it.

He went there for that purpose. He came out, and he said that he found a dry hole. In any event, he did not pursue that transaction at that time, although I think Mr. Lane will agree with me that he continued his interest in the Iranian problem for a very much longer period than that.

Now, why—

The Court: You say he continued his interest in the Iranian problem?

Mr. Rifkind: Oh yes.

The Court: Could you sharpen the focus on that a little? Did he continue his interest in the deal that was then under discussion, if there was any deal?

Mr. Rifkind: The complaint does not allege that the Iranian Government offered him any deal.

[fol. 11592] The Court: That is what I am trying to find out.

Mr. Rifkind: You read the complaint, your Honor. Look at page 18, and I will be happy to focus your attention on it. That is paragraph 6. This is of the utmost importance. It says:

> "Prior to 1952, Cities Service had been unable to obtain a source of crude oil in the Middle East because of the aforementioned allocation agreements."

Now, I didn't deny that when Mr. Lane called attention to it, although the fact is that Gulf was peddling its oil all over—

The Court: The facts that you have referred to, Judge Rifkind: Are they admitted, arguendo?

Mr. Rifkind: I say it is immaterial to us, so if you say, arguendo, it is admitted, that is another way of putting it.

The Court: I would like to know what facts are admitted for the purpose of the motion and only for that purpose. I realize that you don't want to be sucked into an argument over facts, because that would defeat the whole purpose of the motion.

[fol. 11593] Mr. Rifkind: All I say is that I am indifferent whether prior to 1952 Cities Service had or had not been able to obtain oil.

The Court: That is why I want to ask you, so that just as you psychoanalyzed Judge Frank, I can psychoanalyze myself.

Mr. Lane's argument, as I understand it, boils down to the proposition that there was an historic sequence of events, which events are not in dispute for the purposes of this motion, and that those events, including any changes in enthusiasm or position by Cities Service, by and of themselves are of such a nature as a concatenation of occurrences that according to the laws of human experience they constitute a chain of evidentiary circumstances sufficient, says Mr. Lane, to justify a court giving him the privilege of further inquiry.

Now, that is the headnote to his argument.

Mr. Rifkind: That is what I understood it to be, and that is the one that I have taken issue with.

The Court: All right. Therefore, this gets down to a question of logic in the sense that you say that no rational [fol. 11594] mind would draw the inference which Mr. Lane seeks to infer.

Mr. Rifkind: All right. The historic sequence is—

The Court: Just a minute. I listened to you all morning, and I want you to listen to me for ten seconds.

Mr. Rifkind: Yes. It will do me much more good.

The Court: Mr. Lane said in substance that even though he has nothing in writing or nothing orally which constitutes evidence in the sense of Wigmore as distinguished from Winchell, there is a series of events which per se have an internal logic sufficient at least to indicate that what he is talking about is not the mere figment of a psychopathic, imaginative individual.

Is that right, Mr. Lane?

Mr. Lane: Perfect, your Honor.

The Court: Have I over-simplified it, or is that the substance of what you have said?

Mr. Lane: You have simply stated it five times better than I could. It is simply perfectly my position.

[fol. 11595] The Court: All right. Now, Judge Rifkind said—

Mr. Rifkind: Can I address myself to that?

The Court: Go right ahead.

Mr. Rifkind: Taking the headnote as you have indicated it literally, Mr. Lane did specify in his complaint a series of events which he said spelled out this historic sequence from which an inference might be drawn. What is that series of events? No. 1, Cities Service exhibited intense interest in Iranian oil when Mr. Waldron called their attention thereto. That is item 1.

Item 2, Cities Service officials went to Iran and inspected the properties.

No. 3, at that very time that Mr. Jones was inspecting the properties in Iran, Gulf and Anglo-Iranian combined to make an offer to Cities Service of a vast supply of oil at a very cheap price.

[fol. 11596] The Court: It is at that point that you translate that and characterize that as a buy-off.

Mr. Rifkind: Those are the historical events that he mentions in his complaint.

The Court: All right. At that point, bearing in mind that you were in the midst of your narration, temporarily

interrupted, Mr. Lane says that the facts are ambivalent, that whereas you seek to characterize it as a buy-off—

Mr. Rifkind: I don't understand what you—

The Court: He says, again without committing himself, that it is also equally consistent with the theory that they were using in negotiations as a leverage to get a piece of the other deal.

Mr. Rifkind: Let us look at that—

The Court: And the complaint, ingeniously or ingenuously, does not refer to that characterization.

Mr. Rifkind: I will take it either way, your Honor.

So the historical event to which he refers is, one, the interest in and trip to Iran.

Two, an offer or a request, either way. If it is leverage, it is because Jones is asking Gulf; if it is an offer, Gulf is [fol. 11597] asking Jones to take Kuwait oil, either as the price of staying away from Iran or as the threat of staying away from Iran, but the historical events—

The Court: Are those your theories, Mr. Lane? You are keeping the door open because you say you don't want to commit yourself yet.

Mr. Lane: That is right.

Mr. Rifkind: I will take it either way, because what he alleges is this historic event, and, lastly, that as part of the res gestae, so to speak, there was an arrangement whereby Cities Service became a member of the Consortium. That was his series of historic events, as he laid them out in his complaint and as he laid them out in his deposition.

If I destroy that series of historic events, than the historic events do not happen.

The Court: What you claim is this: that this series of historic events that Mr. Lane has described, if that is all there was to it possibly one might view that with suspicion.

You claim you have gone forward and, as the movant under Rule 56 have sustained the burden in effect of eliminating every rational hypothesis of guilt?

Mr. Rifkind: Let me demonstrate that.

[fol. 11598] The Court: Is that what you have done?

Mr. Rifkind: Yes. I say—

The Court: And stated in traditional legal jargon, what you have undertaken to do is to eliminate by documentary and other record facts every rational, reasonable hypothesis of conspiracy.

Mr. Rifkind: You have done it exactly as I would hope to be able to say it.

The Court: That is what you have demonstrated?

Mr. Rifkind: That is right, because I have done this, your Honor. I have demonstrated by uncontradictable evidence that there could not have been this Kuwait transaction at that time used either as bait or as threat, and being that there couldn't be this Consortium transaction, either as bait or as threat—

The Court: What you say is this: that the historical facts up to a point objectively considered, as stated by Mr. Lane—those facts are artificial, because they are taken out of the context of realities which you have sought to demonstrate?

Mr. Rifkind: Your Honor, what is the new set of historical events that appears? All that appears is that Mr. Waldron approached Cities Service, said that he had an interest in Iranian oil. Cities Service says, "We are not [fol. 11599] interested in Iranian oil as such, but we would be interested in taking over the management or having a part in taking over the management of the entire Iranian enterprise in toto."

They went there, looked at it and didn't make a deal.

I say that that is all there is. You can't on that say that you've got the right to be suspicious, because why wasn't there any deal when—and I get back to that "when"—I get back to that, your Honor: please look at page 18 of the complaint. There is no allegation that the Iran people or the Iranian Government or the Iranian Oil Company tendered any kind of a proposal to Cities Service.

The Court: Judge Rifkind, you are not in the government case, because Cities Service is not a defendant there; is that right?

Mr. Rifkind: That is correct.

The Court: But perhaps you know the answer to this question:

Does the complaint in the government case allege as facts in pursuance of the conspiracy a boycott of Iranian oil after the nationalization?

Mr. Rifkind: It does not, your Honor. The entire gov-[fol. 11600] ernment complaint is in this complaint.

The Court: I know. I just want this on the record.

Mr. Rifkind: I am correct, am I not, that it does not so allege?

The Court: Does the complaint in the government case allege as a fact in pursuance of the conspiracy the Consortium of 1954?

Mr. Rifkind: It does not, your Honor.

The Court: Judge Rifkind, one other question on the law:

What case in this circuit do you regard as your strongest authority, as demonstrating a retreat from Arnstein?

Mr. Rifkind: Let us see. Morgan v. Sylvester was affirmed by the Court of Appeals. That is the most recent. That is Judge Weinfeld's decision.

The Court: Specifically what I have in mind is this: when you say that there has been a retreat from the Arnstein doctrine, are you referring to any statement by the Court of Appeals?

Mr. Rifkind: In so many words? No.

The Court: Either as a holding or a dictum that indicates that there is a lessening of what Chief Judge Clark [fol. 11601] once called the general insistence upon full-dress trials as distinguished from trial by affidavits.

Mr. Rifkind: I do not find and have not found such an explicit withdrawal from Arnstein v. Porter, but the behavior of the Court of Appeals is very definitely that way.

I should call your attention, your Honor, to another case I mentioned, Morgan v. Sylvester, and previously I had mentioned the Banco de Espana case. That did not go to the Court of Appeals. But in Schneider v. McKesson & Robbins, decided in the Second Circuit in 1958, they cited this case for the proposition that mere suspicion cannot serve to create a genuine issue of fact.

The Court: All right. Now, gentlemen—

Mr. Rifkind: In Griffin v. Griffin, of course, and the decision by Mr. Justice Black—I regard that as authoritative.

The Court: The Second Circuit policy has been the subject of comment the nature of which I shall not characterize, by those learned in the law.

Mr. Rifkind: I know. The junior courts.

The Court: And regardless of the fact of the dictum of [fol. 11602] the unnamed judge who said the District Courts do what they want and the Circuit Court of Appeals does what it wants, the fact of life is that we have to observe what the Court of Appeals regards as controlling doctrine, and while we sometimes don't know which way the breeze is blowing, we try to gauge the direction of the wind.

Mr. Rifkind: Of course. I would not question that for a minute, your Honor, and I would not suggest to you that you should rebel against the decisions of the Court of Appeals, but I say to your Honor that in behavior the Court of Appeals is more and more falling into line with the general doctrine of summary judgment which prevails all over the United States, and the decisions which I have called attention to are the direction signs which have been posted as demonstrating that that has occurred.

The Court: Do you think they constitute a pattern?

Mr. Rifkind: I think that they constitute—

The Court: A meaningful pattern?

Mr. Rifkind: —a meaningful pattern to indicate that summary judgment is a very useful and salutary device to [fol. 11603] be employed wherever a genuine issue is not made out.

The Court: With that doctrine it would be impossible to argue. Mr. Lane would agree with that axiomatic proposition.

Mr. Lane: I was going to suggest to your Honor that in all this discussion what you must bear in mind is that we are not talking about summary judgment under Rule 56 after the plaintiff has had an opportunity to conduct his discovery. What we are talking about here is whether there is enough in the historical concatenation of events here to entitle this plaintiff to have his discovery.

The Court: That comes to another point that I was holding off until we cleared the way.

Mr. Rifkind: If you limit the historic events to those that I indicated, as I think is the only way to do here, all you have is that here is a salesman who has been disappointed in the fact that his customer won't buy, and that, I submit, is not a basis, a ground from which you can lay a foundation for an examination before trial in an anti-trust case.

The Court: Let me ask you one or two final questions before I turn to Mr. Lane.

Was the newspaper clipping that the plaintiff says he [fol. 11604] read produced at his deposition?

Mr. Lane: No.

Mr. Rifkind: I am confused about that. I don't think it ever was.

COLLOQUY BETWEEN THE COURT AND MR. LANE

The Court: Mr. Lane, what is the newspaper clipping that the plaintiff read that all this talk has been about?

Mr. Lane: Exhibit D, which is attached to the opposing affidavit.

The Court: That is the paper you are talking about?

Mr. Lane: That is the paper I was talking about.

Mr. Rifkind: I did not know that that was the paper he was talking about.

The Court: I just wanted to clarify the record for future use.

The newspaper clipping which the plaintiff read—

Mr. Lane: That is right. That broke the news to him while he was dealing with Cities Service, they were also dealing with Gulf, was Exhibit D attached to the moving affidavit—rather, to the opposing affidavit.

[fol. 11605] The Court: I want to ask you this, Mr. Lane:

You say in paragraph 1 of your opposing affidavit:

"I am acquainted with the facts of the case to the extent that they are known to the plaintiff."

Do you see that statement?

Mr. Lane: Yes.

The Court: Isn't that somewhat ambiguous?

Mr. Lane: I say I believe I am acquainted with the facts to the extent that they are known to the plaintiff.

The Court: Wait a minute. To what extent are the facts known to the plaintiff? What you have done there is, you have wrapped your statement around statement which is an unknown quantity. I don't know whether you did that purposely or otherwise.

Mr. Lane: This is not a cute way of saying something—

The Court: Are you saying that you don't know any more than the plaintiff knows?

Mr. Lane: Yes. I am saying that the same door that is closed in the plaintiff's face is closed in my face, that I have discussed the case with him for untold hours, that [fol. 11606] I have gone through his papers and exhibits. I have also gone through such sources as the congressional hearings—

The Court: I know, but that does not help me.

Mr. Lane: I want to help you. I want to tell you what the basis of my information is.

The Court: Everything you have done has not yielded you anything, apparently?

Mr. Lane: Oh, no. It has yielded a great deal, your Honor.

The Court: You tell me what facts and issues you have unearthed or have by the process of research or otherwise to show that you had something more than suspicion and speculation.

Mr. Lane: What we have here is a cartel—

The Court: Suppose you just go ahead, take your time and just enumerate one, two, three, four, in headline form, what facts you are relying on.

Mr. Lane: All right.

Headline 1: going 'way back to 1928, there was organized and continued from year to year and by agreement after agreement a cartel and monopoly in Middle Eastern oil.

[fol. 11607] Headline 2—

The Court: Up to that point, Cities Service is not in it?

Mr. Lane: Not in it.

The Court: All right. When you get to Cities Service, you will let me know.

Mr. Lane: Of course.

The Court: All right.

Mr. Lane: Headline No. 2: Cities Service was short of crude oil reserves and was looking for crude oil in the Middle East. As a matter of fact, now that I think of it, one of the reasons I believe why Cities Service was not able to get into the Middle East is because it was one of the first if not the first company to deal with Mexican oil after Mexican oil was nationalized as Iranian oil was nationalized.

The Court: Is that in the papers?

Mr. Lane: No. That is not in the papers.

The Court: Don't refer to anything that is not in the papers.

Mr. Lane: Just forget that, if you will, your Honor.

Cities Service needed crude oil. Cities Service was short from 100,000 to 150,000 barrels of crude a day. Cities [fol. 11608] Service was interested in relieving that shortage by a long term contract involving Middle East oil. It

wanted to get into the Middle East, and it had been excluded.

That is alleged in the complaint, and it is not denied, and assume we may take it as established.

Headline No. 4, if that is where we are: Waldron had a valid contract for 15,000,000 tons of oil at very favorable prices, prices so favorable that I don't suppose they could have been matched, except for the crisis in which Iran then found herself.

This would have gone a long way to relieving the shortage which Cities Service was experiencing.

Waldron took that contract to Cities Service, and Cities Service, we believe, saw in this an opportunity far greater than was simply provided by Waldron's 15,000,000-ton, five-year contract.

Cities Service wanted a longer contract and more oil than that.

The Court: That is all in the record?

Mr. Lane: That is all in the record.

The Court: Go ahead. What is the next?

Mr. Lane: It isn't that Cities Service simply said, "We are not interested in your oil." What Cities Service said [fol. 11609] was, "We are interested in the whole Iranian oil industry. Can you get us in the door?"

The Court: Who said that?

Mr. Lane: Burl S. Watson.

The Court: That is in the record?

Mr. Lane: Yes.

The Court: Go ahead.

Mr. Lane: Mr. Lowe, vice president of the company—Watson is not president of the company. "Can you get it?" Waldron said, "Yes, I can." They said, "Are you so confident that you can get it that you will go over at your own expense and risk and try for it?"

Waldron said, "Certainly I will." And they said, "Do it." And they sat down and drafted—

The Court: You say "they". Whom are you referring to?

Mr. Lane: Watson and Lowe.

The Court: That is in the record in the form of plaintiff's deposition?

Mr. Lane: Yes. That is the only thing that is in the record.

The Court: All right. Go ahead.

[fol. 11610] Mr. Lane: So they drafted up the agreement, the invitation as they wanted it. It is in the record. They said, "We must keep this away from the knowledge of anyone else. It is confidential, and I will go and get it." And then, at the last minute, they said, "We are kind of ashamed of making you go at your own expense. We will pay you, but you understand that we cannot pay you by direct check. It's got to be arranged for indirect payment. So you put in your expense account to Mr. Carter, and he will pay you."

At the same time, when Waldron was saying to them, "Well, what's in this for me? I am not going over just for my expenses", they said, "Don't worry about that. You are one of the Cities Service family, and you will get one to two cents a barrel, depending upon what kind of an agreement we finally make. But we can't put that in writing, No. 1, because we don't know what agreement we are going to make, and, if it became known to the trade that we are going against the cartels"—

The Court: What did you just say?

Mr. Lane: "If we put this in writing with you now, we would be put in the position where it could become known that we were opposing 'the big boys' " meaning the five big American majors that made up the American participa-[fol. 11611] tion in the Middle East cartel.

Next headline: Waldron went to Iran, and he got the invitation, which so far has not been put in evidence but which is now Exhibit B attached to the opposing affidavit, signed by the Prime Minister, and Waldron says that that is the same as the invitation which he was requested to get for Mr. Jones, only it had been translated by Iranians into

French, and we translated it back into English for this purpose.

Waldron then came back to the United States and brought this invitation in to the Cities Service office.

Now, bearing in mind it had to be very secret, he went through a devious route of giving it to Mr. Shaw, who is an elderly officer there who had been years before a friend of Mr. Waldron's father, saying to Mr. Shaw, "I just came back from Iran, and I bear an envelope here for Mr. Jones. I don't know Mr. Jones. Can I leave it with you? Will you see that Mr. Jones gets it?"

Mr. Shaw then took it up to the 20th floor, or whatever it is, where they had the head office and gave it to Mr. Watson, who then opened it, and there was great consternation that such an invitation as this had come from the [fol. 11612] Prime Minister of Iran to the president of the company, and everybody pretended that that was something which was quite spontaneous on the part of the Prime Minister of Iran, and a call was put in—this is on the record—to Mr. Jones, who was out at the Bohemian Grove in San Francisco, acquainting him with it, and his response immediately was, "Did Cap Reiber have anything to do with that?" And Waldron said, "I don't even know Cap Reiber. Who is Cap Reiber?" And then Mr. Shaw, the old gentleman, said "Jerry, I have known your father for years, and I want you to be on the level with us. Did Cap Reiber have anything to do with this?" And Waldron said, "I give you my word. I never had anything to do with him."

But by inference—I confess that is all—it shows that Jones and Cities Service had been trying for years to get an invitation through Cap Reiber and had failed, and Waldron had got it, and they wanted to be sure that it was not through Cap Reiber.

What I am trying to emphasize in this is that this was a very serious business in which Cities Service was tremendously interested.

Jones then said to Waldron on the phone that he had [fol. 11613] done a wonderful job, that he and Nelson were to go back to Denver and wait until Jones had had his inoculations and his people had had their inoculations and gotten their passports and everything to prepare to go, and they would get together in New York to go again, and they did just that, Waldron and Nelson and Carter going over first to get the accommodations for Mr. Jones appropriate to the importance of the trip, and by that time Waldron said to Jones, "What about the threats that have been made by Anglo-Iranian?"

You realize that in this record, too, there are letters from Sullivan & Cromwell to Mr. Waldron and to Mr. Nelson, I think also to his other two associates, warning them not to deal with this oil, that this was Anglo-Iranian's oil and that any deal with it would result in their prosecution.

Then there were publications in the paper by Anglo-Iranian saying, "Don't touch this oil." And in fact, Anglo-Iranian was tying up at that time a small Italian tanker which had had the temerity to go in and pick up a load of oil, and there was a lawsuit pending in Aden.

When Waldron asked Jones about this, Jones replied, "I'm not afraid of Willy Frazer. We will make them take [fol. 11614] this, and if we can come to terms with the Government of Iran, they will have to come to terms with us." And so, at this point, Waldron had the backing of probably the most powerful independent oil company in the United States.

The Court: Just a minute. How close did Cities Service come to actually making a deal, according to the record?

Mr. Lane: Well, we can't say that according to the record, but we can—according to the newspaper clipping—

The Court: No, Mr. Lane. According to the record before me. You understand that I am confined to the four corners of the papers before me and the exhibits. That is what I meant by the record.

Now, according to the record before me, how close did Cities Service come to making a deal?

Mr. Lane: I will show you what is on the record—

The Court: You tell me. You have lived with this case for some time. You don't have to refer to papers.

Mr. Lane: You can look at Exhibit C in which Jones talks to the press before leaving on the 19th of September, [fol. 11615] and he says, "My purpose in coming here was to reactivate the oil industry. That is why the Prime Minister asked me"—

The Court: That is why he went there. Was an offer made?

Mr. Lane: And it says, "I have also made a preliminary report to the Prime Minister, and when I get back to New York, after a week I shall make a further report." We have never seen any of those reports, so we don't know what is in them.

The Court: Was an offer made by Iran or by Cities Service?

Mr. Lane: We cannot go that far. All we know is that Iran was desperate at that time—

The Court: I know, but I am trying to find out something. You don't know whether or not Iran made an offer or Cities Service made an offer?

[fol. 11616] The Court: All you know is that he came, he saw and he said he is going to report.

Mr. Lane: That's right, but see it in the frame of reference—

The Court: Look, I am seeing it in the frame.

Mr. Lane: All right.

The Court: I just want to know what the facts are.

Mr. Lane: He came, he saw, he had the opportunity, he was hailed for having come and indicated his willingness to do it, and then stopped.

The Court: When you say there was a 180-degree turnabout, will you give me your before-and-after description showing me the 180-degree turn other than the fact that there was enthusiasm before and indifference later?

Mr. Lane: I can date it. That is all I can do. I can say that when Waldron left Iran, Jones' mood was, if the

Anglo-Iranian Oil Company doesn't like it, we will pour it down their throats. I can say that after Waldron left Iran and went to Paris, the Jones party went to Kuwait. Then when the Jones party then came to Paris, they said [fol. 11617] there is billions in this but we may have struck a dry hole.

The Court: Is that when the conspiracy was joined by Cities Service, according to you?

Mr. Lane: In point of time according to us that is it.

Then let me take it a step further. Waldron said, "You mean we have this difficulty about transportation?"

Jones said, "Yes."

Waldron then said, "I will go back to New York ahead of you and I may be able to surprise you about that transportation."

He came here, talked to the Lemos Bros., Greek shipping interests, and was led to believe that with a long-term contract with a company as strong an independent as Cities Service, the tankers would be no problem. And then when he went down to the Cities Service—

The Court: According to you, Cities Service was not in a conspiracy yet.

Mr. Lane: Yes, it was. According to me, Cities Service came into this conspiracy—the indication of it is—at the [fol. 11618] time when Waldron and Jones parted company in Iran.

The Court: What evidence have you got or clues or leads or hearsay or anything other than speculation?

Mr. Lane: Simply the inescapable fact—

The Court: Mr. Lane, we all know that when you start a case there may be gossip, clues, leads, good hearsay and so forth. You tell me, other than speculation and suspicion, what you have in the way of information, hearsay, clues or leads, and you take your time and tabulate it.

Mr. Lane: Obviously I don't characterize it as speculation and suspicion. What I say is they went to this point together as opponents of the cartel, and when they reached

this point Cities Service made a 180-degree turn and from that time on was in with the cartel and opposed to Waldron.

The Court: Is that a circumstance per se which you say is pregnant with meaning?

Mr. Lane: That's right.

The Court: And that is your case?

Mr. Lane: That's right.

The Court: I just want to be sure that I understand. [fol. 11619] That is your case so far as Cities Service is concerned?

Mr. Lane: Let me give you this additional evidence to substantiate it.

The Court: We will come to that. Up to that point all you have, in addition to the historical backdrop that you have given me, is the change in attitude of Mr. Jones?

Mr. Lane: That's right.

The Court: And you say that change in attitude, by analogy to the doctrine of res ipsa loquitur, speaks for itself, whatever that means?

Mr. Lane: That's right, should be explained.

The Court: That is your theory up to that point.

Mr. Lane: Yes.

The Court: Now go ahead and give me the additional evidence.

Mr. Lane: All right. We add to that that after Waldron talked to the Lemos Bros. here in New York City and went down to the Cities Service head office to announce that tankers would be available, the answer to him was: "You have no business to meddle in the transportation because [fol. 11620] you have upset the whole charter market by what you have done and, besides, Cities Service is not interested."

The Court: Who said this to whom?

Mr. Lane: This is either Watson or Lowe, I don't know which, of the offices at Cities Service, saying to Waldron, "Cities Service has no interest in Iranian oil, and we are going to get Carter back from Paris to take charge of you, so to speak."

The Court: And you say that statement constitutes evidence.

Mr. Lane: I say that coupled with all the rest of it it certainly does.

The Court: All the rest of it is what you have narrated?

Mr. Lane: That's right, and I say that it is heightened by the fact that Waldron was never told at that time anything about Cities Service having made instead a long-term contract with Gulf, not a word was said, no explanation.

The Court: Then you claim that the two material factors that you rely on are, one, the change in the attitude or position vis-a-vis a deal to be negotiated with Iran—

Mr. Lane: Yes.

[fol. 11621] The Court: —and, two, the non-disclosure—

Mr. Lane: That's right.

The Court: —by Cities Service to the plaintiff as to what was going on with Gulf.

Mr. Lane: That's right, the secrecy with which it was attended.

The Court: You call non-disclosure secrecy. I want to be sure we are talking about the same thing.

Mr. Lane: We are calling it the same thing. A man who has been taken in as a member of the family, who is going to have the fairest treatment and wonderful compensation, was suddenly excluded from the family with no explanation offered.

The Court: And that is the gist or the substance of what you are relying on for the purposes of getting discovery.

Mr. Lane: Yes. Then we say from that time on, as you can see, Cities Service was persona grata with the members of the cartel and Cities Service was one of the dozen companies in the United States that was trying to qualify to bid.

The Court: Now I want to ask you this, Mr. Lane: You [fol. 11622] say that the terms of the proposed Kuwait contract became progressively more favorable?

Mr. Lane: Yes.

The Court: Could you specify what you mean by that by referring to the record?

Mr. Lane: Yes.

The Court: Because Judge Rifkind takes sharp issue with you.

Mr. Lane: If you would make a note to look later, your Honor—

The Court: All of this is being taken down by the reporter.

Mr. Lane: Of course, of course. One thing that I was referring to was—

The Court: I want this in detail. You start in some place and give me the facts and figures or paragraphs or whatever you have there.

Mr. Lane: I will give you just one which is enough—

The Court: Don't give me one. Give me everything you have on that, and I will give you all the time you need to present it.

Mr. Lane: I am not sure I can give you all I have on it [fol. 11623] because the contract which was finally signed in January, 1953, is quite a different document in form from the earlier drafts which were exchanged between the parties.

The Court: You tell me now whatever you know now to demonstrate that there was a progressive improvement in the terms offered to Cities Service.

Mr. Lane: I would call your attention to the fact that on October 17, 1952, which is a month after the events we have been discussing, Mr. Hill, who signed the moving affidavit for the defendant in this case, wrote a letter to Mr. Bartlett, vice president of Gulf Oil Corporation, in which, on page 2, paragraph 4, referring to Article 17, he said that the proposed charge of five cents a barrel for loading the products at the Philadelphia refinery was unacceptable to Cities Service, and I call your Honor's atten-

tion again to the fact that a penny a barrel made a difference of $920,000.

Then, if you would go to the final contract which is document 28, you will find in it a paragraph which fixes that price I think at $2 a barrel.

The Court: I will tell you what you do. In your reply [fol. 11624] memorandum will you devote a separate section to detailing—I think you had better put it in affidavit form so that it is part of the record; briefs are not part of the record. But put it in an affidavit and set forth chapter and verse of what facts you rely on to demonstrate the terms of the contract were made progressively more favorable, and then, Mr. Lane, will you show the chronological relationship between the alleged improvements and the plaintiff's activities. In other words, you claim that there was a concurrence or parallel action here, that the improvement in the terms was designed to accomplish some ulterior purpose; is that correct?

Mr. Lane: What I am saying in substance is that Cities Service could join the cartel and participate in the fruits of the Middle East or it could fight the cartel and take for itself the Iranian oil industry.

The Court: You will demonstrate that in an affidavit.

Mr. Lane: Well, I will try.

The Court: All right.

Now I come to something that I think has not been dis- [fol. 11625] cussed at all to any great extent, at least, on this argument. That is the distinction between subdivision (e) and (f) of Rule 56. Doesn't Rule 56(f) require an affidavit by a party, not the attorney?

Mr. Lane: No, your Honor.

The Court: Look at the rule.

Mr. Lane: I beg your pardon. It does. It says right in it that it requires such an affidavit, but the decided cases say that where the only thing that the affiant could do was to say, as I have said in our affidavit, that the evidence is in the hands of the defendants, it serves no purpose and will not be required, and we have in this circuit—

The Court: I know, but you are referring to cases that deal with subdivision (e).

Mr. Lane: I don't think so. I think I am talking about Subin v. Goldsmith and your Honor's own decision in Austin Theatre v. Warner Bros. Pictures to which I refer at page 2 of my affidavit.

The Court: Isn't there a distinction between (e) and (f)?

Mr. Lane: Yes.

The Court: Subdivision (e) requires a statement under [fol. 11626] oath.

Mr. Lane: By persons having knowledge—

The Court: Just a minute—of facts as would be admissible in evidence, and obviously where a party does not have facts admissible in evidence there the cases say that under the circumstances the attorney may submit an affidavit. In fact, you don't even need an affidavit if the only issue is the question of good faith or motive or intent of the other side.

But now subdivision (f), on the other hand, does not call for facts that would be admissible in evidence. It calls for the statement of reasons. Subdivision (f) calls for a statement of reasons, not a statement of evidence. And the statement must be made by the party.

Mr. Lane: My authority is Moore. I will cover that more carefully in the memorandum, if your Honor evidently wants it covered more carefully. My understanding of it was that where all the affiant could say was that he would have to get this branch of his evidence from the other side—

The Court: I know, but you have to give reasons. The word "reasons" I am quoting. You have got to give rea- [fol. 11627] sons. Reason must mean some logical, rational statement explaining your position. You cannot say I want it because I want it because I want it. That is not a reason. You have to give a reason.

Mr. Lane: We thought we had done it. But, in any event, could we cover that in the memorandum also?

The Court: Well, you had better put it in an affidavit. It should be the affidavit of the party.

Mr. Lane: All right. I will be glad to do that.

The Court: And I think in fairness to you, in order to avoid having to reargue this on a new set of papers and having everybody come back again, you ought to get an affidavit from your client—

Mr. Lane: I will be glad to.

The Court: —in which, for purposes of saving stenographic labor, unless Judge Rifkind objects, all he has to say is that he read a copy of your affidavit and that he incorporates every fact set forth in there to the extent that it is set forth in his affidavit so that all you need is [fol. 11628] one paragraph.

Mr. Lane: I would have done it if I had realized it was necessary, and I won't say that the plaintiff—

The Court: Is that all right pro forma, as far as you are concerned?

Mr. Rifkind: Certainly.

The Court: But that is not a major part of your case. All right.

Mr. Lane: It will take me probably four or five days to get it because he is in Phoenix.

The Court: All right. Suppose Judge Rifkind has eliminated every reasonable hypothesis of a conspiracy on the part of his client. Would you say that you are still entitled to discovery?

Mr. Lane: No, I don't think so.

The Court: You say he hasn't eliminated every reasonable hypothesis.

Mr. Lane: He hasn't eliminated it, and I say for that that you may in such cases as this and in derivative stockholder suits have a perfectly valid explanation on paper which turns out to be quite different when you have the actors on the stand and examine them. So I don't see how [fol. 11629] we are brought to this—

The Court: What reasons are you going to set forth over and beyond what you have already told me? Have you given me all the reasons?

Mr. Lane: I think so, but I don't want to foreclose myself from giving more if they occur to me. You realize that we—

The Court: Just a minute. You say that the defendants have submitted to the Court a pre-selected group of documents.

Mr. Lane: That's right.

The Court: What do you mean by that?

Mr. Lane: It is simply that they have given the Court what they chose to give, and I don't know what additional documents there are. I don't know either how this would look from the Gulf side of it. Maybe it is quite different. You can't tell.

The Court: Have you any clue or lead or rumor to indicate that your suspicion has any basis other than the mere speculation that there are other documents of a material character?

Mr. Lane: No, but I don't think I should be put in that position.

[fol. 11630] The Court: I am asking you if you have a clue or lead or gossip or rumor.

Mr. Lane: No, I don't have it.

The Court: You have nothing but just the thought that that might be.

Mr. Lane: That's right. I agree with you.

The Court: You have nothing but the mere thought, not based upon any specific clue, lead, gossip, rumor or hearsay.

Mr. Lane: I have nothing, I don't even have their say-so, that these are all the pertinent documents. I don't even have that. All I have is—

The Court: That can be supplied if it is the fact.

Mr. Lane: I would like to know if it is the fact. There must be a world of correspondence in addition to this.

There must be many memoranda of how this thing developed. I don't know whether there were collateral agreements to this. I have no idea. All I know is that they tell me that these documents are enough to answer my complaint.

It seems to me that these documents show the very con- [fol. 11631] verse of what they say they do. It seems to me these documents show that they were not in agreement with Gulf at the time when they went on this Iranian venture, and it seems to me that if they had been in agreement with Gulf they never would have gone to Iran.

The Court: All right.

Now, Mr. Lane, let us assume for the sake of argument that the Court might permit your client to have some kind of an examination before trial of Cities Service.

Mr. Lane: Yes.

The Court: Do you recognize that in order to prove that Cities Service was a member of a conspiracy that you would have to prove membership by acts and declarations of Cities Service itself?

Mr. Lane: I would have to prove it by their acts and declarations—

The Court: Not the acts and declarations of other alleged co-conspirators, because they are not vicariously binding on Cities Service unless and until you first show that Cities Service is a member of the conspiracy; is that right?

Mr. Lane: That's right. But that doesn't mean that— [fol. 11632] The Court: Just a minute. So that therefore, before you get into a full-dress, general, dragnet discovery, assuming any discovery is granted, your examination would be confined or should be confined to an examination of Cities Service to establish by its acts and declarations that it is a member of an alleged conspiracy; is that correct?

Mr. Lane: I wouldn't think so.

The Court: You tell me what you think of that.

Mr. Lane: I would assume that I can prove that conspiracy by anybody who participated in it and had knowledge of it and could tell me about it or produce a document proving it, whether it came from Cities Service's file or from some other source. I would assume that I could not prove it from the act of Gulf in doing something else, or Anglo-Iranian in doing something else, but if I could get Sir William Frazer, just for example, to say: Yes, I had a talk with Jones and we agreed on this and that—

The Court: Then you would be proving admissions or statements by Cities Service.

Mr. Lane: That's right. But with witnesses in the other [fol. 11633] oil companies and not in Cities Service.

The Court: Then it is your position that there is no way of carving out or narrowing the scope of an examination of Cities Service for purposes of subdivision (f), that you would have to get—

Mr. Lane: I think the obvious place to begin is with Cities Service, with the personnel with whom all these dealings were had, and whether we need to go farther than that I don't know, and it would depend very much on what turned up there, but I remind you again that I am not interested in dedicating my life to this lawsuit. I want to do it as efficiently as I can. I think there is enough in this to warrant having that opportunity. I wouldn't rest easily until I had it. The place to begin is with W. Alton Jones.

The Court: Has the deposition of the plaintiff been completed?

Mr. Lane: Yes.

The Court: By everybody?

Mr. Lane: Yes.

COLLOQUY BETWEEN THE COURT AND COUNSEL

Mr. Dean: Not the ones mentioned in your order, your Honor.

[fol. 11634] Mr. Lane: I beg your pardon. I thought it had been.

Mr. Dean: There has been the utmost delay in this matter. The plaintiff has asked for adjournment after adjournment because of alleged illness. Mr. Lane has asked for a number of adjournments for personal reasons. Mr. Nelson has asked us, because he was unemployed, to examine him in the evening, although he has not kept his schedule for the examinations in the evening. And although he is not presently employed, he did not notify us of that fact after he made the agreement. And we have not yet examined Mr. Bentley.

I might say that the delay is in no way due to the fault of the defendants. Every delay has been at the request of the plaintiff.

Mr. Lane: I thought your Honor was asking whether the plaintiff's examination had been concluded. I understood that it was concluded. There may be a tag end here or two, but at present his principal associate, Nelson, is being examined. After that Bentley is to be examined. There are 262 days—

The Court: The examination in behalf of the defendant [fol. 11635] has not been completed yet pursuant to that order?

Mr. Lane: No, that's right.

Mr. Rifkind: Your Honor, in so far as Mr. Lane says that he wants to examine with respect to the contacts he says were had with officials of Cities Service, we have taken Mr. Waldron's testimony, and certainly he doesn't expect that the deefndant's testimony is going to be more favorable to him than his own testimony. He is the one who had those contacts, and we have his deposition as to every conversation and contact he says he had with these people at Cities Service.

The Court: What he means, as I understand it, is that if he examines the defendants he may be able to develop some evidence supporting his theory of the case. That is what Mr. Lane is driving at.

Mr. Rifkind: Let me make a few comments on a few separate matters that he mentioned.

First, this story of the 180-degree turn and that something happened in Iran, and how close did he get to a deal, your Honor asked. This exhibit which is annexed to Mr. [fol. 11636] Lane's affidavit says that Mr. Jones denied having made any agreement or commitment to do anything or having come to any final decision and stated that he had discussed the purchase of oil only as a remote possibility.

I did not offer that. Mr. Lane did. But as far as Mr. Waldron himself is concerned, of course he testified at page 6247:

"Q. I assume that from what you have just said that at no time did Mr. Jones come to you and say or say in your presence that he had a deal with the Iranians.

"A. No.

"Q. Nor did any other Cities Service person say to you that a deal had been effectuated between Cities Service people and Iranian.

"A. No.

"Q. Nor did any Iranian person, that is, an official of the Iranian Government, or of the National Iranian Oil Corporation, ever say to you that a deal had been made with Cities Service.

"A. No.

"Q. Did any Iranian official or any official of NIOC"—that is the National Iranian Oil Corporation—"while you [fol. 11637] were there and in the presence of any Cities Service personnel ever tell you that a specific proposal had been made by the Iranians to Cities Service?

"A. No."

And so on and vice versa, too.

There was a reference that something happened when Mr. Jones allegedly left Iran and went to Kuwait. I think I did not misunderstand Mr. Lane that he said something like that. Two propositions on that.

First of all, Kuwait is a great refinery. It is located in the sheikdom of Kuwait in the Middle East. But the prin-

cipal officials of Gulf are not located at that refinery. I think your Honor will almost take judicial notice that the principal officials of Gulf with whom contracts are made are located in Pittsburgh.

The Court: I don't know that. I tried tanker cases involving Kuwait Oil and so forth, but my judicial knowledge of where the Gulf officials are located is not within my ken.

Mr. Rifkind: The documents themselves that are in evidence show that of course the officials of this great [fol. 11638] corporation are located at their headquarters in Pittsburgh and not in a desert oil field out in Kuwait.

The Court: They have some air conditioned buildings there, don't they?

Mr. Rifkind: So I hear.

The Court: It has been written up in Fortune Magazine. It sounds like a paradise.

Mr. Rifkind: Please take my word for it, it is not the place where the president of Gulf goes to spend his holidays. There are more attractive places around the perimeters of the earth and on its seas than the hot little place known as Kuwait.

But, be that as it may, this is an interesting commentary upon this whole transaction. It is true that Mr. Jones was invited to go to Kuwait, but he never got there.

There was some reference to—

The Court: Is that in the record?

Mr. Rifkind: I don't know whether it is or not, but, if necessary, I will put in a supplemental affidavit to cover that. It never occurred to me that anybody would claim that he had.

[fol. 11639] There was some notion that the deal was improved with respect to the loading charge, and Mr. Lane made reference to that. I think I ought to give you just a sentence or two on that. It is all in the record, in the papers that you have before you.

The Court: Why don't you cover this in your supplemental memorandum. Because in the final analysis, Judge,

I have to go through every single piece of paper that is referred to here. I have tried to read as much as I could during the recesses of trials of other cases, but that is not entirely satisfactory, and while I won't have the idle hour or half hour suggested by you, we will make the necessary time. So that in the interests of saving time—

Mr. Rifkind: It will take one sentence and I think perhaps Mr. Lane will abandon this line.

The Court: Go ahead, but I doubt that.

Mr. Rifkind: Before Waldron there was no loading charge. On October 17th Gulf suggested a five-cent loading charge, and thereafter it was settled at a four-cent loading charge. That was the improvement in the deal.

[fol. 11640]

STATEMENT BY THE COURT

The Court: Now, gentlemen, I would like to call to both of your attentions the following, and solicit your comments:

Mr. Lane may be in the position that a prospective plaintiff is sometimes in when he seeks to obtain an examination before trial for the purpose of framing a complaint. Under the Federal Rules a person who thinks he has a claim may, under Rule 27(a), obtain an examination before trial for the purpose of framing a complaint. Query: Whether, having framed a complaint, a plaintiff may then seek to do that which he should have done before he served the complaint. That is the first question.

By way of elaboration, a person may well feel that he has a grievance but may not be in possession of evidence sufficient to allege the plain, concise statement required by the rules, in which case, before he serves the complaint, and starts a lawsuit by filing the complaint, he may get an examination before trial. Query, and I am restating the same question: Whether, having served the complaint, he may then proceed, after he starts the litigation, to do that which he should have done before he served the complaint.

[fol. 11641] Second question: Under Rule 27(a) the contents of a petition are set forth where you seek to examine another person for the purpose of framing a complaint, and it is a mandatory provision of Rule 27 that you must set forth "the facts which he desires to establish by the proposed testimony * * * and the substance of the testimony which he expects to elicit from each (persons he expects will be adverse parties and persons to be examined)."

It may well be that the rule which applies in order to permit a person to obtain a pre-complaint examination before trial, which requires you to set forth the facts and the substance of testimony, also applies no less where you have a post-complaint examination before trial, and that if the plaintiff is in the position of the petitioner, under Rule 27 are the standards less or more liberal?

These may be diversionary questions which lead to a blind alley, I don't know, but they are suggestions that I throw out for more mature consideration by counsel who are concerned with this.

Is there anybody in the courtroom who, though not having filed a notice of appearance for purposes of this motion, [fol. 11642] desires to be heard on or off the record? And I am addressing other attorneys.

STATEMENT BY MR. DEAN

Mr. Dean: As counsel for Standard Oil of New Jersey, your Honor, I would merely like to call to your Honor's attention that pursuant to your order of February 13, 1958, in which you set forth the times of examinations of the plaintiff Mr. Waldron and his co-partners Bentley and Nelson; we have diligently tried to finish with that examination, and, as I said earlier, the requests for delay come entirely from Mr. Waldron, either because of the state of his health or because of certain matters which Mr. Lane wished to engage in.

Mr. Nelson has been a particularly difficult witness to examine because he has stated over and over again that he has deliberately and intentionally put his entire recollection with respect to this matter out of his mind and that he has deliberately tried to erase it from his memory.

The Court: Who represents him?

Mr. Dean: Mr. Lane. Even the simplest questions take many hours to elicit an answer to, and in order to accommodate Mr. Nelson, because he was trying to get employ-
[fol. 11643] ment, we agreed to examine him in the evenings, but I am sorry to say that he has not been too cooperative in that arrangement; and we have not yet been able to examine Mr. Bentley because we have not as yet been able to finish the examination of Mr. Nelson.

There are also a few matters which, as is stated on the record, we have to examine Mr. Waldron on because when we were examining him he asked that we defer a certain portion of his examination.

I would merely like to say, while certain assumptions have naturally been made here for the purposes of this motion, I am sure your Honor is aware that there was an action brought by the United States Government in the spring of 1953 which is now pending before Judge Cashin.

The Court: What is the status of that?

Mr. Dean: The status of that is that the defendants have answered very voluminous interrogatories, and presently we are complying with an order of Judge Cashin to go into certain foreign countries and to produce documents from those foreign countries and we have to make a report on that to Judge Cashin this spring. The actual report is in
[fol. 11644] the fall, but we have got to sit down and tell Judge Cashin the status of it before the spring term.

A good many statements have been made here about this Consortium. I think there is a document in evidence that the State Department specifically requested Mr. Waldron not to go to Iran and specifically warned him that the relationship between the United States Government and Iran was very critical.

The Court: Is that in the record here?

Mr. Dean: That is in the record.

The Court: Does anybody know the exhibit number?

Mr. Dean: Yes, I can give you the exhibit number.

Mr. Rifkind: That is not in my deposition but it is in the general deposition.

The Court: Is it something that is before me?

Mr. Rifkind: Yes, he has made the entire record part of the material available.

The Court: Mr. Lane, pointing to the left here, you have some eight volumes and batches of papers. What does that represent?

Mr. Lane: That is the transcript of the depositions to [fol. 11645] date, and additionally we have the exhibits.

The Court: All right. Mr. Dean.

Mr. Dean: I would like to show you this, your Honor. This is Standard Oil of New Jersey Exhibit 3 marked in connection with the examination of Mr. Waldron. As you will note, on that document—

The Court: Do you want to put this in the record here so it would be easier to locate?

Mr. Dean: Yes.

The Court: Do you want to mark this or read it in?

Mr. Dean: I will be very glad to read it in.

The Court: Whichever course will be easier.

Mr. Dean: This is a letter dated February 4, 1952, addressed to the Hon. Edwin C. Johnson, Chairman, Committee on Interstate and Foreign Commerce, United States Senate, signed by Jack K. McFall, Assistant Secretary, Department of State, Washington.

"My dear Senator Johnson:

"The receipt is acknowledged of your communication of [fol. 11646] January 30, 1952, enclosing a letter from your constitutent, Mr. Gerald B. Waldron, requesting clarification of the attitude of the Department of State regarding the sale of Iranian oil in the United States at this time.

"In the Department's opinion, the British-Iranian oil controversy is basically a matter for negotiation between the two governments directly concerned. Because of our vital interest in this matter the United States Government continues to use its influence toward finding a solution of this difficult problem. In line therewith, we welcome the initiative of the International Bank for Reconstruction and Development which is currently trying to work out a plan for settlement of the controversy, and are extending every appropriate assistance in such efforts as the bank is making in this regard.

"The Department is of the opinion that the injection of any non-official individual, group or organization into this dispute might prejudice the ability of the parties concerned in reaching a satisfactory solution. Accordingly, the Department believes that non-official entities should refrain [fol. 11647] from getting involved in the dispute.

"Mr. Waldron's thoughtfulness in wishing to learn the attitude of the Department in this connection is very much appreciated. His letter is herewith returned.

"Sincerely yours, for the Secretary of State:

"Jack K. McFall, Assistant Secretary."

The Court: And the date of that letter?

Mr. Dean: The date is February 4, 1952.

Prior to this time Henry Grady in 1951 was the American Ambassador there and he had been doing his best to bring about a settlement of this dispute. Then President Truman sent Averell Harriman there in the summer of 1952 in an effort to settle this dispute, and Ambassador Loy Henderson was our Ambassador there and he advised Mr. Waldron, when Mr. Waldron went there, not to get involved in this matter. This whole question was a matter that involved the personal attention of President Eisenhower and the National Security Council, and it was due to the intervention of the President and the National Secu-

rity Council that this Consortium was worked out at the request of our government in September of 1954.

[fol. 11648] The Court: That appears in the record before me?

Mr. Dean: Yes. I merely wanted to say, your Honor, that if anything comes up in this particular motion which might involve in any way a reconsideration of your Honor's order of February 13, 1958, or in giving any right of examination to the plaintiff, we should think that that ought to be set down as a separate matter.

The Court: I tell you now that that order stands. That order stands. The existing order stands. I am not reconsidering that. The only question now is whether or not, under Rule 56(f), there is sufficient justification for adjourning Judge Rifkind's motion pending such time, whenever that occurs, that the plaintiff conducts a discovery. That is one of the questions before me.

Mr. Rifkind: Your Honor, the comment that I should like to make, if I may—

The Court: Judge Rifkind, before you get started, the statements of fact made by Mr. Dean, are they cited in the record any place in your papers? If not, could you submit—

[fol. 11649] Mr. Rifkind: Not in our papers.

The Court: Could you submit a memorandum annotating in the sense of pagination the statements made by Mr. Dean?

Mr. Rifkind: We shall be glad to do that.

The Court: So that it has a factual basis in the record before me.

Mr. Rifkind: We shall be very glad to do that by supplemental memorandum. And the statement I want to add, your Honor, really will not throw light upon this question that you are considering, but considering that we are dealing with personalities of considerable standing in the community and corporations of great magnitude, I think your Honor should know, and I don't want the public to misun-

derstand, that when Mr. Jones went to Iran he first consulted with the President of the United States and with the Secretary of State and it was at their joint solicitation that he proceeded to accept the invitation he had received from the Prime Minister of Persia.

It is not in this record, but I didn't want, in the light of [fol. 11650] what Mr. Dean said, to have the impression go that Mr. Jones went to Iran in opposition to the wishes of our State Department. Such is not the fact. And we will submit a memorandum to prove that for the historical validity of the situation.

The Court: All right. Mr. Dean, you have something else you want to add?

Mr. Dean: Mr. Steyer wanted me to put on the record, your Honor, that there have been some short adjournments for mutual convenience of counsel and some of them at defense counsel's request, but all the major ones have been made at Mr. Waldron's request or at Mr. Waldron's counsel's request.

Thank you, your Honor.

The Court: Mr. Pollack.

STATEMENT BY MR. POLLACK

Mr. Pollack: Your Honor has mentioned that other counsel have not filed notice of appearance on this motion, and it may be that some of the facts or alleged facts are intertwined with the balance of the case which is before your Honor as a Rule 2 judge. I should like to place on record I am the attorney for the British Petroleum Company in this litigation.

[fol. 11651] The Court: Let me ask you this, Mr. Pollack. Would you prefer to submit an affidavit?

Mr. Pollack: No, I should prefer just to tell you what I have noted down here.

The Court: All right. Go ahead.

Mr. Pollack: British Petroleum was given informal and not direct notice of this motion and is therefore here solely

as a spectator and no assertion that I know of is made hereon directly or indirectly as against British Petroleum. I would like to have that clearly appear on the record since no legal notice to the contrary was served on us by the plaintiff. British Petroleum does not by its presence as a spectator wish to be understood as accepting the competitive statements of alleged fact, if any, or the competitive conclusions thereon, or even the assumptions arguendo of the moving or of the opposing party, nor is it necessary for British Petroleum at this time to select and affirm those which might be true.

Moreover, British Petroleum assumes and asks that any findings of fact by the Court on this motion be made only on the assumption that they are rigorously limited [fol. 11652] and applied solely to Cities Service and to Waldron. Such underlying facts as might be said to appertain to British Petroleum will be presented by British Petroleum when its turn comes to deal with any issues that might appear as against it, and nothing on this motion should be deemed to prejudice or be deemed to adversely affect the free presentation of the facts by British Petroleum or the Court's consideration of the issues with British Petroleum.

I therefore ask that any ruling that the Court makes on this motion should expressly reserve out of the ruling at this time any fact or any conclusion which might be said or thought to adversely affect the defendant British Petroleum Company, Ltd.

The Court: All right. The Court on its own motion will apply a similar stipulation with regard to all of the other defendants in the case than Cities Service with the same force and effect as if counsel made the same request that Mr. Pollack has just put on the record.

I grant your request, Mr. Pollack. I grant other counsel's requests.

[fol. 11653] Mr. Lane: Just one brief remark, your Honor.

The Court: Mr. Lane, before you rise, is there anybody else in behalf of any of the other defendants who wants to say anything?

All right, Mr. Lane.

Mr. Lane: I only wanted to point out that the record indicates over and over again that after that letter was written to Senator Johnson the plaintiff, in all that he did with the Iranian matter, kept the CIA informed and that there is nothing which would justify the impression that the plaintiff was a meddler who was reckless of the consequences of what he did vis-a-vis the United States.

Mr. Rifkind: And I certainly don't want to get involved in that issue.

The Court: Well, we will stick to Rule 56.

Mr. Rifkind: May I hand in a little reply brief?

The Court: Is this a promise of things to come or is this it?

Mr. Rifkind: This is as of this moment but, since your Honor has asked some additional questions, there un- [fol. 11654] doubtedly will have to be a supplemental memorandum.

The Court: All right, gentlemen, let's fix some deadlines.

Mr. Lane, Judge Rifkind, can you complete the final submission by Friday of this week?

Mr. Beshar: Can we find out when we get the transcript, your Honor?

The Court: When did you order it for?

Mr. Beshar: Originally we said we did not need it tonight, but we did not realize there would be these additional affidavits required.

The Court: I mention this Friday deadline for a very practical reason. I go into the motion part for two weeks on Monday.

Mr. Rifkind: We will do our best. I mean by that, you know, that we will just perform. Have we any choice?

The Court: How about you, Mr. Lane? You have to have an affidavit from your client.

Mr. Lane: That's right.

The Court: Where is he now? He is in Arizona, according to your papers.

Mr. Beshar: Can you give us a week after Judge Rif- [fol. 11655] kind puts his in?

The Court: No, there will be a simultaneous submission. I will give you an extra week. Make it May 20th for final submission, and, gentlemen, you will understand that I do not want to receive letters.

Mr. Lane: We do not want to write them, Judge.

The Court: Nonetheless, you do. I do not want letters. When the briefs are submitted, that is, that is your final submission, and I don't want a letter-writing marathon because one letter provokes a reply, and then the letters are not part of the record, as much as I like to hear from distinguished counsel. You know what I mean.

Mr. Lane: We know.

Mr. Rifkind: And I only say thank you very much for giving us such a long delay.

The Court: You are more than welcome. It is a pleasure to hear both of you. It is a very challenging case.

We stand in recess.

(Reporter's Certificate to foregoing paper (omitted in printing).

[File endorsement omitted]

[fol. 8351]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-223

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GERALD B. WALDRON, individually and doing business as CONSOLIDATED BROKERAGE, Plaintiff,

—v.—

BRITISH PETROLEUM CO., LTD., CITIES SERVICE CO., SOCONY MOBIL OIL CO., INC., STANDARD OIL CO. OF CALIFORNIA, STANDARD OIL COMPANY (NEW JERSEY), THE TEXAS COMPANY, Defendants.

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**Transcript of Hearing on Motion—New York City, May 3, 1961, 4:50 P.M.**

Before: Hon. William B. Herlands, District Judge.

APPEARANCES:

Casey, Lane & Mittendorf, Esqs., Attorneys for Plaintiff; Samuel M. Lane, Esq., and Robert P. Beshar, Esq., of Counsel.

[fol. 8352] Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., and Henry L. O'Brien, Esq., Attorneys for Defendant Cities Service Co.; Simon H. Rifkind, Esq., Edward N. Costikyan, Esq., Arthur B. Frommer, Esq., of Counsel.

Sullivan & Cromwell, Esqs., Attorneys for Defendant Standard Oil Co., (N.J.); Roy H. Steyer, Esq., and Hamilton F. Potter, Esq., of Counsel.

Mr. Rifkind: May it please the Court, we have served returnable for this hour a proposed order to carry into effect what we believe to be the effect of your decision, as

published in the opinion in Waldron versus British Petroleum. May I say that it is a restrictive order. It is a restrictive order because we believe that the opinion warrants the submission of a restrictive order.

Now, I may just want to have this preliminary comment with respect to that. Your Honor is familiar with Rule 11 which, among other things, provides that an attorney's signature to a complaint is a certificate by him, among other things, that to the best of his knowledge, information and belief there is good ground to support that complaint.

I wonder whether, if plaintiff's attorney had signed that complaint with the language of the rule, which is that to the best of his knowledge, information and belief there is good ground to support it by reason of the fact that, as far as Cities Service were concerned, he was to say Cities [fol. 8353] Service is named as a defendant because of suspicion and by reason of a gossamer inference from the mere sequence of events—I wonder whether if he had done that, that complaint, that signature, could have survived a motion to strike, and that complaint could have continued as a complaint, or whether it would have been stricken as sham in accordance with Rule 11.

I do not mean to use this occasion to reargue the motion.

The Court: The motion itself is adjourned.

Mr. Rifkind: Exactly. The motion itself is adjourned, but I say that in the light of the opinion—

The Court: Judge Rifkind, I pondered for weeks on the application of that rule and its thrust on the merits of this matter, and my thoughts were parallel to yours. I will say that I have adjourned—I adjourned the motion, and am permitting the very limited and restricted examination largely as a matter of policy rather than cold reason or logic.

Mr. Rifkind: Very well, then I need not pursue that.

I will say the order limits the proposed examination to two subjects which are the two subjects which the plaintiff specified continuously in his examination before trial as the subjects which prompted him to have the suspicions

which he entertained—namely, the making of the agreement with Gulf Oil Corporation, and the extension to Cities Service of an opportunity to become a member of the Consortium.

We limit the examination to those two items. And since Mr. Hill, an officer of Cities Service, is the officer who was in charge of both transactions we limit the examination to him.

When I do that, your Honor, I do not mean to suggest that if it should appear during the course of Hill's examina-
[fol. 8354] tion that some other witness could throw light on it that would be helpful to the Court, that an application could not properly be made to the Court for such relief, but in the first instance it is our view that Hill has been identified as the man who has conducted both transactions, he is the man that we tender as the person informed of the subject, and we think in the light of the limitations upon the scope and extent of the examination that it would be an appropriate limitation so to circumscribe it, and for that reason we have submitted the order as indicated.

Our good friends, the attorneys for the plaintiff, have submitted a counterorder which, as I read it, says no more than that this matter is adjourned. If that was all there was to it, I don't think we would need an order. We didn't need an order to do that. But I think now, while the matter is fresh in your Honor's mind, fresh in counsels' mind, and while the thing can be, so to speak, crystallized so that it can be dealt with on the basis of an order, I think it would be appropriate to do so at this time, and for that reason I submit the order for your signature.

Mr. Beshar: May it please the Court, my name is Robert Beshar, I am associated with the firm of Casey, Lane & Mittendorf, counsel for the plaintiff.

I wish to explain to the Court Mr. Lane is not here because he has an examination in the Green case, the Martyn Green case, and the doctor being examined there is about to leave the country. He intends no disrespect, and he may in fact manage to get here, but he was unable to adjourn

that examination, which had been scheduled previous to this hearing.

We don't really have too much to say about Judge Rifkind's proposed order. We have submitted our own order which we think—

The Court: Your order is largely a paraphrase of some [fol. 8355] of the thoughts I expressed in the memorandum, but it has no administrative or operating provisions.

Mr. Beshar: Yes, we read your opinion, your Honor, to say that the hearing on the order to circumscribe the plaintiff's discovery would be more appropriate after the defendants had concluded their examination of the plaintiff's associates.

I believe we were led to that conclusion by the second paragraph of your opinion, which reads: "When the commencement of such proceedings shall be deemed to have become timely under the outstanding controlling order of the Court, counsel will be heard as to the nature and scope of proposed depositions, discovery and inspection, and other related pretrial matters."

That is the exact language, you will notice, we have put in our proposed order.

The Court: Why isn't it timely now to get this thing set up?

Mr. Beshar: Well, it is not timely for a variety of reasons, not only on the merits as to Judge Rifkind's proposal as to who shall be examined and as to what topics, but as to the timeliness issue itself, we think only after plaintiff's associates have been examined, and we have all the plaintiff's side of the story in. One of the principal people to be examined is Mr. Carter, a former employee of Cities Service, and the principal liaison between plaintiff and Cities Service. Only when he has been examined will we really know what Cities Service's side is before we actually go about discovering directly on Cities Service.

We respectfully suggest at that time it will be more appropriate to set out the metes and bounds of plaintiff's discovery.

In any case, if you want to go to the merits, as to whom we shall have the right to examine, frankly we find it rather [fol. 8356] novel that in a conspiracy situation the defendant nominates the man who is going to talk about the conspiracy.

Mind you, Waldron, the plaintiff, never once contacted Hill either by word of mouth or in writing. Hill, we are not blind to the fact, your Honor, is a lawyer, and I am sure if he were the only person we could examine on Cities Service, it would be a very, very expeditious examination. The question is whether it would be a fair examination, and we think that in a conspiracy situation the logical people to examine are those with whom plaintiff has dealt.

Now, the record is quite clear, exhaustively clear, that plaintiff has dealt on numerous occasions with Mr. Jones, the head of the company at that time, with Mr. Watson, the present head of the company, with Frame, with Lowe, with Whetsel—

The Court: The fact he dealt with people or spoke with them, does that make them amenable to examination?

Mr. Beshar: We think so. That, perhaps, brings us to the nub of the problem.

The Court: Isn't the purpose of this thing discovery of what the facts are, and the thing to do is to get the man who has the closest contact with the situation?

Mr. Beshar: Good, we accept that, your Honor, and we say this is the nub of it, and we say that Mr. Waldron has testified that that is the nub of it, and certainly the pleadings are: Did or did not Cities Service conspire to frustrate plaintiff's efforts? That is the issue.

Judge Rifkind stated that in his argument. Your Honor has stated it in his questioning of counsel on the argument. It is in the pleadings; and certainly Mr. Waldron's testimony by Judge Rifkind was that while Kuwait and Consortium were the outstanding things he had in mind, he [fol. 8357] did not foreclose himself for a moment that there might be other things which would explain why Cities Service did conspire.

But you can go beyond that, you know. I don't think a plaintiff has to tell why, what was the quid pro quo to induce somebody to join a conspiracy. The inducement might be that Sir William Fraser promised Jones he would put him up for St. Andrews.

The Court: I tell you now in as plain English as I have command of, and in so doing I am reiterating what I said in the memorandum, that I am not going to let the plaintiff in this kind of situation harass Cities Service.

Mr. Beshar: Your Honor, we accept that.

The Court: For the reasons set forth in the memorandum.

Now, this is going to be a circumscribed and restricted examination, and I am not going to let the plaintiff examine as many people as he wants, nor am I going to permit the plaintiff to conduct the kind of examination that ordinarily is permitted under Rule 26 and the related rules.

Mr. Beshar: Your Honor, we certainly accept that, and we do not propose to subject Cities Service to the kind of examination that we have been subjected to. You realize that plaintiff testified a hundred and some-odd days, I think, with Standard Oil of New Jersey alone. We are not about to—

The Court: We are not interested in matching statistics.

Mr. Beshar: No, but we do feel, sir, that it is a complicated case involving a large and complicated matter, and the idea that the only person we will have to examine about this conspiracy is someone with whom plaintiff never dealt, who is a lawyer to boot, and who is to be examined for a period of ten days only, on these two topics alone, we think it is simply not appropriate to the lawsuit involved.

[fol. 8358] The Court: We can determine that.

Mr. Beshar: And you can determine that, of course, as you must, and you will, and the question is whether you do it now or whether you do it at the conclusion of the defendants' examination of the plaintiff.

But this is, I suppose, what I have in mind, your Honor, by submitting my proposed order. In a way Judge Rifkind brings on a whole hearing to limit plaintiff as to his—

The Court: It is obvious to everybody who has read the papers on the motion for summary judgment that he is concerned, and he has good reason to be concerned, because if he were to subject Cities Service and all of its personnel to a roving dragnet, fishing expedition, where the plaintiff has nothing but suspicion, there might be an injustice.

Mr. Beshar: Yes, but we can't—

The Court: And he has good reason to be concerned, and so has the Court.

Mr. Beshar: Of course you realize, your Honor, that our view is that practically all antitrust cases begin on suspicion, and not on very much more.

The Court: Well, generalities don't help us decide cases.

Mr. Beshar: The Government begins, your Honor, more often than not, with a bunch of identical bids—

The Court: But you are not the Government; you are a private plaintiff.

Mr. Beshar: That is right, and we had no chance to discover before we brought the complaint through a Grand Jury the way the Government ordinarily would, or through the FBI and voluntary compliance.

The Court: Unless you give me good and persuasive, cogent reasons I shall sign the order as proposed by Cities Service.

[fol. 8359] Mr. Beshar: Excuse me a moment.

The Court: If it should appear on the examination of Mr. Hill that there are other witnesses who have material and relevant evidence to give, then the Court will at that time take up any application for the examination of such other and further persons.

Mr. Beshar: Fine. As far as—

The Court: And if it should turn out that the examination cannot be completed in ten working days, and by ten working days we mean that examination which is conducted with appropriate diligence and without any attempts of procedural delays of any kind, that they are really ten working days, and that time is inadequate, and it is my judgment you need more time, I will entertain an applica-

tion. I am not attempting to foreclose the plaintiff. This is not an arbitrary, immutable decision.

Mr. Beshar: Would you like to hear, your Honor, my cogent reasons that you asked for as to why I think you should not sign this order?

The Court: Yes, I would.

Mr. Beshar: I think the most compelling one is this: That it is an antitrust case, that plaintiff never once dealt with this man, but rather he dealt with this man's superiors in direct, face-to-face conversation, he traveled with these other men of Cities Service to Iran, that the basic issue in the case is when he got to Iran what turned Jones away from following through. That is our basic theory in this case.

The Court: But his own testimony, his own testimony, plaintiff's own testimony, with regard to all of these matters, does not warrant the examination of these other people at this time.

Mr. Beshar: Your Honor, if the plaintiff, for argument's sake, if you will pursue this with me, if the plaintiff is completely mistaken as to the true rewards that flowed to Cities [fol. 8360] Service for joining the conspiracy, it still does not destroy the fact that that conspiracy would be actionable if it harmed the plaintiff. What the rewards were, what the inducements were, to enter the conspiracy is not part of the essential pleading. That is mere surplusage.

The Court: I understand.

Mr. Beshar: If plaintiff speculates, and he is wrong in that speculation, I still respectfully suggest to your Honor that it would be a mistake to limit plaintiff to examination on those two counts.

The Court: I shall approach—I tell you now, Mr. Beshar, I am approaching this matter with pragmatic caution. I will deal with this in accordance with the dynamics of the situation. Instead of entertaining applications to narrow the examination, which is the ordinary situation, I am looking through the telescope at the other end: I am starting out with a narrow examination and then, as occa-

sion may warrant and considered on the merits in the light of the situation, I will determine whether and to what extent there should be enlargement of the boundaries of examination because I believe, having read the thousands of pages of testimony and exhibits and the briefs in this matter, that the plaintiff at this point has not presented a sufficient basis to justify the ordinary Rule 26 type of examination.

Mr. Beshar: Yes, I can understand if this examination, your Honor, is in response to a motion for summary judgment, and is to enable us simply to assemble enough to satisfy ourselves that we can oppose his motion on the merits, that, therefore, it is not as broad an examination as it would be if we were just taking an ordinary pretrial examination.

The Court: The purpose of this examination, so far as I am concerned, is to enable you, if possible, to get com- [fol. 8361] petent evidence which can eventually be incorporated in an affidavit, or in the form of sworn deposition, sufficient to show there is present a genuine issue of material fact.

Mr. Beshar: Fine. Now, your Honor, if, as Judge Rifkind has said in his argument, the issue is whether or not Cities Service conspired with the defendants to frustrate plaintiff, then Mr. Hill is not the logical person to begin with, let alone to be the sole witness.

The Court: Now, Judge Rifkind says, and I have reason to believe that it is correct, prima facie, that Mr. Hill is the man who knows most about these two topics. After all, you are examining a corporate defendant and you must do it by a person who has most intimate knowledge with those transactions.

Mr. Beshar: Of course, your Honor. We would concede for the moment without knowing anything about it that Mr. Hill is the most knowledgeable about Kuwait and Consortium. The point I am trying to make is that Kuwait and Consortium are not the essence of whether or not Cities Service conspired. They could have conspired

for a variety of reasons or for no reason—for Auld Lang Syne they could have conspired.

The Court: You are abandoning the essence of the position you took before me on the original motion?

Mr. Beshar: I am sorry. I didn't hear your comment, sir.

The Court: You are abandoning the basic position you took before me on the argument of the motion for summary judgment, then?

Mr. Beshar: Your Honor, emphatically not. We are remaining with the position that this is, to quote your Honor, a concatenation of events which reaches out and asks the question: Why?

Now, this man was in contact with Jones. Jones took [fol. 8362] a team over to Iran, and we want to know why he did not go forward.

The Court: I know.

Mr. Beshar: I suggest to you that there can be a variety of possibilities, and that we should not be restricted in our examination because plaintiff believes it was one of two possibilities, or both of them. It could be something else. The most appropriate way to commence the examination is to examine the people with whom he dealt.

The Court: I am not going to let you ask a man a lot of whys based upon the fertility of your imagination in asking questions. There has to be something more to justify asking questions in this case.

Mr. Beshar: Your Honor, I appreciate your concern. I have great respect for Judge Rifkind, and I can't believe he would allow any one of his client's employees to be abused by us by needless questioning. I assure you if we do not stick to the point and move the examination expeditiously in examining Mr. Jones, and the people who are directly involved in this case, and examine them, I might say, while they are still living, because we have terrible concern here, your Honor, in that Mr. Shaw and Mr. Whetsel, two of the principals, have already died, and now we are being asked to examine this lawyer for Cities

Service who will be an astute witness, in all probability, who will testify very expeditiously. Then we go back to the motion, and we are still kept away from examining the people who are essential to our case. Mr. Jones and Mr. Watson, sir, these are the crucial witnesses in this case.

The Court: Why do you say that they are crucial? You have no information or knowledge about anything that they did.

[fol. 8363] Mr. Beshar: Because they, better than anyone else, know why Cities Service did or did not—

The Court: I know, but you just can't ask questions. You have to come to court with some information.

Mr. Beshar: If events place these men directly in the orbit of the problem, I suggest the place you begin is the center, the man who has the control and power and made the decision not to go ahead.

The Court: The difficulty is that your arguments are convincing only in vacuo and a priori. But there is nothing of a factual nature that has been forthcoming.

Mr. Beshar: Your Honor, that is all I have, the factual nature of the case.

The Court: Judge Rifkind, you had something?

Mr. Rifkind: I rose not to argue the point, because there is nothing I need to add to what your Honor has already said, but there are two statements of fact to be corrected.

One is, at the time of these transactions Mr. Carter was not and had not been for a long time an employee of Cities Service. The reference to him as a former employee of Cities Service might suggest that he was one during the course of these proceedings, and that is not the fact.

No. 2, the reference to Mr. Hill as an attorney is, I think, half a full statement. He was a man who had been admitted to the bar. He has been an executive of Cities Service in its foreign department for many years, he is a senior vice-president, he hasn't practiced law in how long—a generation or more. He is a mature citizen. He

did go to law school. I think that would be a fair statement of the proposition that he is a lawyer.

The Court: All right.

I have not the slightest doubt that the way to go about this matter is to sign the order as proposed by Cities [fol. 8364] Service, with the understanding that at the conclusion of the examination of Mr. Hill the Court will entertain any application that appears to be reasonable and proper at that time, and I will do this on a witness-by-witness basis, and a subject-by-subject basis, so that there is a supervision and regulation by the Court of the kind and character to which I referred in the memorandum.

I am signing the order so that there is no delay.

Mr. Clerk, will you see that this is filed?

The Clerk: Yes, your Honor.

The Court: And have it returned to me after it is filed.

The Clerk: Yes.

The Court: All right. We will adjourn all proceedings in this matter sine die, subject to any applications that may be made.

[fol. 12056]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil 110-223

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GERALD B. WALDRON etc.,

v.

BRITISH PETROLEUM CO., LTD., et al.

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**Transcript of Hearing—New York, February 9, 1965, 4 P.M.**

Before: Hon. William B. Herlands, District Judge.

APPEARANCES:

Casey, Lane & Mittendorf, Esqs., Attorneys for Plaintiff, By: Samuel M. Lane, Esq., Robert W. Sweet, Esq.

Sullivan & Cromwell, Esqs., Attorneys for Defendant Standard Oil Company (New Jersey); By: Arthur Dean, Esq., Roy H. Steyer, Esq.

Milton Pollack, Esq., Attorney for Defendant British Petroleum Co., Ltd.

[fol. 12057] Donovan, Leisure, Newton & Irvine, Esqs., Attorneys for Socony Mobil Oil Co., Inc., By: George S. Leisure, Esq., J. R. Withrow, Jr., Esq., James M. MacNee, III, Esq.

Nixon, Mudge, Rose, Guthrie & Alexander, Esqs., By: Goldthwaite H. Dorr, Esq., Robert R. Thornton, Esq.

Cahill, Gordon, Reindel & Ohl, Esqs., Attorneys for Standard Oil Co. of California, By: William M. Sayre, Esq.

Paul B. Wells, Esq., Attorney for The Texaco Inc.

Paul, Weiss, Rifkind, Wharton & Garrison, Esqs., Attorneys for Defendant Cities Service Co.; By: Simon H. Rifkind, Esq., Edward N. Costikyan, Esq.

[fol. 12058] The Court: The first item on the agenda is the motion of Patricia Waldron for an order substituting her. Is there anything further to be said?

Mr. Lane: I take it there is no opposition to that, your Honor, and I have a prepared order if you would like to see it.

The Court: I have a memorandum decision that I could read into the record.

Mr. Lane: Just as you wish.

MEMORANDUM DECISION GRANTING THE MOTION OF PATRICIA WALDRON FOR AN ORDER SUBSTITUTING HER, ETC.

The Court: I will read it now.

The Court hereby grants the motion of Patricia Waldron for an order pursuant to Rule 25(a) of FRCP, substituting her in her capacity as executrix of the last will and testament of the deceased plaintiff, Gerald B. Waldron as plaintiff in this action.

The defendants have not opposed the granting of this motion.

Agreeing with the position urged by the defendants, the Court will defer, pending the adjudication of liability by trial or otherwise, a determination of the issue relating to the survivability of the claim for the trebling of the alleged actual damages and of the claim for attorneys' fees in the event it should become necessary to consider that issue in [fol. 12059] this action. So ordered.

Mr. Lane: Then your Honor your memorandum as so ordered will be all that we need and we don't need to serve any final order at all.

The Court: Precisely.

Mr. Lane: Thank you.

I think we should provide that the caption will be amended.

The Court: All of the implementing papers necessary to assure formal compliance with the order will rest in the hands of counsel.

Mr. Lane: Thank you.

The Court: On the agenda are two additional motions. The motion made in behalf of Cities Service for a determination, a final determination of the pending summary judgment motion made by Cities Service and plaintiff's cross motion for discovery, dated September 15, 1964.

I will hear Judge Rifkind. I presume you represent Cities Service.

Mr. Rifkind: I will ask Mr. Costikyan to argue this motion.

The Court: Very well. I will hear the motion made by Cities Service for a final determination of the pending [fol. 12060] summary judgment motion.

ARGUMENT BY MR. COSTIKYAN

Mr. Costikyan: If the Court please, I would like to start with a brief word of history and I think relevant history going back to the 8th day of April, 1960, when Cities Service was faced with a claim by plaintiff, which he had carefully spelled out in his complaint and in that document it was charged that the defendants or some of them, other than Cities Service, had formed a conspiracy some time in the year 1928 and that in 1934 the rest of the defendants, other than Cities Service, had joined in that alleged conspiracy.

It was alleged that Cities Service was not a member of this alleged conspiracy, which it was claimed was directed against plaintiff in the year 1952, until some time in late August or early September, 1952, your Honor, and I am quoting from the complaint at page 19.

At that time, according to the plaintiff, Anglo-Iranian and Gulf conspired to offer to Cities Service Kuwait oil and Cities Service accepted and the complaint says: At this time and by these acts Cities Service entered the

alleged conspiracy and the complaint goes on to say that [fol. 12061] as a further consequence of joining the conspiracy, Cities Service gained a participation in the consortium some time later.

Now, your Honor, on that day in April, 1960, the plaintiff had repeatedly testified on his deposition that but for these acts, that Kuwait and consortium, he had no complaint against Cities Service and at that time, your Honor, we were dealing with the original complaint in this action, not a subsequent amendment. We examined our files and we found document after document. We did not rely on the credibility of any witness because there was no witness, but document after document that demonstrated that plaintiff was simply wrong. That Kuwait was not a bribe to Cities Service and the consortium was not a reward. We made our motion for summary judgment and we annexed on both the original and the supplemental affidavits some 81 documents and this court wrote an opinion after full and careful analysis of all the arguments and all of the contentions and all of the documents and your Honor said: It is doubtful in the extreme whether plaintiff has shown that there is a genuine issue as to any material fact with respect to his claim against defendant Cities Service Company. The naming of Cities Service Company, as a defendant herein, when the complaint was drawn, was based only [fol. 12062] on suspicion and on a gossamer inference drawn from the mere sequence of events.

Later in your Honor's opinion you said "Because plaintiff's claim against the defendant Cities Service Company is judged by the entire available record so insubstantial the plaintiff will not be given carte blanche authority to conduct untrammeled pre-trial proceedings."

But your Honor did give him another chance and you said you may have examination on these allegations in your complaint and so that examination of Mr. Hill was had. During the course of it and indeed, your Honor, during the course of arguments in this courtroom concerning the scope of the examination and concerning the plaintiff's

own claim against Cities Service, the plaintiff invented a new theory. He said there was a complete turnabout of 180 degrees by Cities Service insofar as the subject of Iranian oil was concerned and he fixed the time with precision. He said when Mr. Jones was in Iran he was for it and by the time he got to Paris he was against it and that your Honor fixes the time pretty precisely at September 24, 1952.

And said Mr. Lane and the plaintiff, Cities Service was no longer interested in Iranian oil. It had the entire in- [fol. 12063] dustry in its grasp and it turned it down. It terminated its relations, it dropped its interest.

And so, your Honor, ultimately after several arguments and rearguments in 1964 of the spring your Honor gave Mr. Lane and the plaintiff authority to go ahead and examine on that theory, even though there was no allegation in the complaint, we were content to proceed and your Honor was content to proceed to permit an inquiry into the question of whether this change of position was the result of a conspiracy with the other defendants and so your Honor carefully drafted an order which gave full and complete examination on that subject.

You authorized examination concerning internal Cities Service communications and communications between Cities Service and other defendants during the period when this change was claimed to have taken place and if there had been anything to plaintiff's new theory of a turnabout, this examination would have revealed it.

Now, says the plaintiff, having had that examination, having pursued three witnesses through many pages of transcript, having examined dozens and dozens of docu- [fol. 12064] ments, he says that he was wrong. He says there was no turnabout. He says there was no 180-degree change. He says it your Honor, at page 20 of his affidavit in support of the motion for further examination.

He says "It does not happen to be the fact, however, that Cities Service lost interest in Iranian oil. Contrary to what plaintiff was told, Jones continued to take a keen

interest in Iranian oil as Watson himself admitted. A special Iranian room was set up at Cities New York office and put in the charge of a young Iranian woman, who looked after the files."

And so, your Honor, having had the examination, having denied what the documents showed on the original motion that Cities' interest continued and having put us through the examination, plaintiff now says well I was wrong on that, there was no turnabout and he is right now, there was no turnabout. There was no loss of interest and the entire premise for the examinations that consumed almost a year has now evaporated.

The other subject as to which examination was permitted again did not relate to any allegation of the plaintiff's, but merely to a speculative inquiry. He says he was trying [fol. 12065] to sell oil to Richfield in the summer of 1953. This was after his contract, his property, which is the foundation stone for his being in this courtroom. After that contract had expired, but he says he tried to sell oil to Richfield and they wouldn't buy and he wants to know whether this was the result of Cities Service interference. He doesn't allege that it was, your Honor, and he has admitted that when he drafted the complaint he had no factual basis to make that charge and he didn't have any factual basis to make that charge when his deposition was taken and that is found at page 6087 of Mr. Waldron's deposition.

Now, your Honor, he has examined Cities Service on this allegation or this theory or this speculative inquiry or whatever it is and he still has not a whit of a fact, nothing to support even the suspicion that there was any interference by Cities Service with this deal or prospective deal with Richfield.

But, your Honor, I go farther: I say that on the basis of plaintiff's own testimony and the admissions that he has made on this motion, he has demonstrated that if that claim was made that we did interfere, because we were part of [fol. 12066] a conspiracy, that the claim would be sham.

According to the plaintiff, your Honor, at page 12 of his brief, and it is a brief he filed last fall, he says:

"Plaintiff does not claim that Jones was acting on behalf of a conspiracy when he sought the invitation or when he went to Iran or when he held his Tehran press conference or when he wrote the conclusions to his final draft report on October 31, 1952."

That final draft report, your Honor, I will refer to later, but it was a draft report in which Mr. Jones set forth his conclusion that Cities Service would not be willing to get into the Iranian situation unless the Iranians first made arrangements with the British to compensate them and secured their cooperation so that there would be tankers and markets available.

According to the plaintiff on this motion, when Mr. Jones reached that conclusion, which is the key conclusion in the whole case, according to plaintiff he was not acting as a conspirator.

And so, your Honor, we now have it from the plaintiff from his original complaint that we weren't a conspirator up until late August or early September, 1952; from his brief I have it that we weren't a conspirator right through [fol. 12067] October 31, 1952; and from his affidavit, which I read to you earlier, where he admitted there was no loss of interest, we have ourselves still interested in Iran until July of 1953, but the story doesn't end there, your Honor, because it goes right on and according to plaintiff we were still not a conspirator in the spring of 1955. Now, how do I demonstrate that?

There was an exhibit marked, your Honor, and it was brought before your Honor earlier relating to a conversation between Cities Service personnel and the Undersecretary of State at the time who was in charge of dealing with and attempting to solve the Iranian situation and according to that memorandum, which has been accepted by the plaintiff and indeed relied upon by him in this motion, Cities Service in February of 1954 was going to the Undersecretary of State, who was working out what later

turned out to be the consortium, is objecting to it, is saying that it is monopolistic, is saying it is wrong because it excludes us and the other have-nots and is saying that it is bad policy because it creates a monopoly of substantially all world oil reserves in a few companies, not including us. [fol. 12068] And, says the plaintiff, accepting this evidence at page 20 of that same affidavit, in fact and I quote your Honor "In fact Cities watched with resentment when the Iranian pie was ultimately cut up by the seven international majors in a manner characterized by Cities as creating a monopoly for these companies." Some conduct for a co-conspirator.

This, your Honor, carries us through the spring of 1955 and so what plaintiff would have to claim, if he wished to assert that as a co-conspirator with some alleged conspiracy we interfered with his dealings with Richfield, that Cities Service was going down to Washington and complaining to the federal government about the other defendants; that it complained that it had been excluded from the benefits of what this plaintiff says is a conspiracy by the other defendants; that it resented the fact; that it was not bribed by Kuwait; that it was not rewarded by consortium; that it had a continued interest in Iran and that it had advised Iran as a non-conspirator and in good faith that the Iranians should settle with the British, but, says the plaintiff, all this was a big smoke screen, that really secretly under it all Cities Service was a memorandum of [fol. 12069] a conspiracy and, as such, excluded from its benefits, it was telling Richfield not to deal with the plaintiff.

Now, your Honor, in Mr. Waldron's brief many years ago he dismissed the case of Griffin against Griffin in which summary judgment was granted as a case which dealt with the ravings of a maniac. I submit to your Honor that this unasserted case as to Richfield here on the basis of which some further examination is sought is no more rational and no more tenable and no more assertable than the ravings which were dismissed in Griffin.

Now, your Honor, there were some other aspects to the claim which I would like to deal with. First, in order to buttress the assertion that there had been some kind of change of position by Cities Service, which has now been abandoned, Mr. Waldron came up with the theory that a J. A. G. Sandberg, who was a Cities Service stockholder in Holland, had been the secret communicant from this alleged conspiracy to Cities Service because it is clear that Mr. Jones talked to Mr. Sandberg when he was in Holland in August and in September of 1952 and, says plaintiff, Mr. Sandberg was a member of the Shell Finance Committee. Shell is an alleged co-conspirator and there it is. [fol. 12070] Well, there are only a few things wrong with that, your Honor. First of all, there was no change in position. Secondly, according to the plaintiff at the time these conversations took place, Cities Service was not an alleged co-conspirator and he doesn't allege it. The third thing, your Honor, is that Sandberg had absolutely nothing to do with the Royal Dutch Shell Company or any of its subordinates or affiliates; never did; hasn't to this day and it's another scrap of misinformation which the plaintiff picked up some place, founded a long motion on, just as he founded a long complaint when he picked up his misinformation about Kuwait and consortium.

What is left in this case, your Honor? What is the material proposition of fact which plaintiff asserts, which defendant denies? He has examined on his allegations, on his theories, on his suspicions, on his speculations. There have been 2,500 pages of transcript. That is the equivalent, I would think, of 10 full court days. We took, actually, 15 days of deposition to cover it.

The allegations of the complaint has been demolished and forgotten long ago. The theory of the 180-degree turnabout has now evaporated. The suspicion against [fol. 12071] Richfield still remains a suspicion, which is untenable. Every hypothesis of guilt has been examined into and every surviving Cities Service agent or employee,

who had any knowledge of the facts, has been examined and this is what is left of plaintiff's complaint because I have taken it out of his own documents, his own affidavits, his own pleading. He says in 1928 there was a conspiracy, but Cities Service was not part of it. He says in 1934 all the defendants joined in it, but not Cities Service. He says in 1952 all these defendants conspired to deny the plaintiff tankers and financial services and to boycott them, but not Cities Service.

He says that in July and August of 1952 he negotiated with Cities Service, which declined to purchase any oil from him instead seeking an invitation to Iran and, he says, that when they did that they were not members of the conspiracy. He continues that he did get an invitation and Jones accepted it and he went to Iran, but when he did so, he was not a member of the conspiracy.

And he says that Cities Service concluded that it was not possible to reactivate the Iranian oil industry without a settlement and cooperation from the British and that [fol. 12072] is the report to which I have referred. He says at the time Cities Service so concluded, Cities Service was not a conspirator.

He continues that the Iranians did not settle with the British until 1954 and when they did they reached a settlement which did not include Cities Service. He says during the period from 1952 through 1954 and early 1955 Cities Service "watched with resentment when the Iranian pie was ultimately cut up by the seven international majors in a manner characterized by Cities as creating a monopoly for those companies."

Then comes his prayer for relief, your Honor. Having alleged facts which demonstrates that Cities Service was not a conspirator, he says, by reason of the premises plaintiff has a right to determine whether maybe Cities Service nevertheless conspired with somebody at some other time in some manner unknown to the plaintiff.

Now, I say to your Honor that is not a complaint upon which any relief can be granted in this court, but what the

plaintiff is really saying is I know I have nothing, I know that after 2,500 pages I have established Cities Service's innocence, because I say so, but don't grant the motion. [fol. 12073] Maybe one more examination of other people, not of Cities, might reveal some other basis to claim that Cities Service conspired with the defendants to injure me and, says the plaintiff, I have the right to all the examination I want once I have gotten a complaint in this court.

Your Honor, I submit to you that is not the law. It has not been the law and if it ever was thought it might have been the law, that thought has been demolished in the last year in this circuit.

The law, it seems to me, it's clear and there is a recent case, your Honor, which we have made a little supplemental memorandum of, which I would like to hand up at the end of my argument, the Schwartz case, which was decided in late December by the Court of Appeals, which made it clear that the unsupported assertion of a conclusion of fact which will not defeat a motion for summary judgment where the facts demonstrate that the conclusion is insupported and that is all there is in this case, your Honor, is one allegation in one document in the amended complaint which says, I think Cities Service conspired.

I want to suggest to your Honor that there is no question [fol. 12074] in this case and no real issue between us as to what the law is. I say that under the Arnstein decision, summary judgment should be granted because there is no issue of credibility of any deponent upon which we rely. We rely on the documents and on plaintiff's own admissions and under the Sandpiper case there is certainly no question that plaintiff has exhausted the rights which he is granted under the Federal Rules.

I would like to suggest, your Honor, however, another alternative and that is even if there were no summary judgment, I cannot figure out how for the life of me what further examination is supposed to relate to. What is the disputed proposition of fact which plaintiff asserts and I

resist and what is it material to? Certainly at this point the allegations in the complaint are out and it is not enough, your Honor, just to assert a bald proposition and say, therefore, I can examine everything under the sun.

Here are the specific things that I find in the opposing papers that he says he wants to examine on and I say to your Honor that every one of these alleged transactions antedate October 31, 1952, and in his brief he drew a curtain at that date and said well, I will finally admit that [fol. 12075] everything prior to October 31, 1952, you weren't conspiring.

He says he wants to find out all about an AVGAS transaction in which Mr. Waldron wanted to get help from Cities Service to sell some aviation gas to the United States Government and Mr. Waldron, according to Mr. Waldron, was told by Mr. Watson, we won't help you, says Mr. Waldron, but I was told that Mr. Jones told Mr. Corder he would help him and he didn't.

Well, your Honor, I don't care what happened on that transaction. It took place in September of 1952 and he has said to me you weren't conspiring then and he knew all about the AVGAS transaction when he said it. There is no later discovered fact.

He says, I want to find out why Mr. Jones wanted to keep this trip to Iran secret. I don't care why he wanted to keep it secret. For the purpose of this motion I will admit that he did, but what difference does it make? According to him he wasn't a conspirator when he went to Iran.

He says he wants to examine about an alleged conversation in which Cities Service promised Mr. Waldron one to two cents a barrel on any oil that might be imported. That conversation took place, according to the plaintiff, [fol. 12076] on July 8, 1952. I don't care what they talked to him about. The plaintiff has said I was not a conspirator on that date and that is wholly irrelevant to any claim he can assert against me. He says that I would like to show Mr. Jones' motives in going to Iran were not as noble as

he wished or as he said they were because Mr. Jones said he wanted to do a statesmanlike act and, says the plaintiff, I think he was just trying to make a fast buck for Cities. Well, I don't care why he went to Iran. If he went to Iran because he had an interest in occultism and was merely using all of this as a cover, it is irrelevant to this plaintiff's purposes because he has admitted that when Mr. Jones went to Iran he was not a conspirator.

He says he wants to find out what Carter can tell him and, yet, every one of the transactions to which he refers in his affidavit, as to which he would like Mr. Carter to examine, are transactions antedating October 31, 1952, to the extent we had anything to do with them.

Now, your Honor, I go through all this and I come out with the same question: What is the controversed issue or material fact which requires a trial, which requires examination, which requires anything?

[fol. 12077] I say to your Honor finally that he suggests that he didn't get enough documents or have enough depositions. He got 81 documents on the motion for summary judgment. He marked 141 on his depositions. There were many others that he got that he didn't mark and I think that is a pretty substantial production of documents for a transaction with which we had such a fleeting connection.

That brings me, your Honor, to my conclusion. Why are we here? The basic question which plaintiff still asks—and it runs through his papers as it did the day we made our motion—is why didn't Mr. Jones and Cities Service take over the Iranian oil business? There it was in his hands, why didn't he do it? Was it because of conspiracy? Out of that basic query he constructs a whole bunch of subordinate ones. Why did he want to keep the trip secret? What could Carter tell us? Why didn't Jones get the gold medal from the API in November of 1952? I say to your Honor this is a great example of taking a piece of evidence, which negates any claim he might make, and turning it around because if Mr. Jones had received the gold medal, after he allegedly had been severely criticized by the oil

[fol. 12078] industry, after he had decided not to go ahead in Iran and after all the rest of the things that are talked about, I am sure that that gold medal would be the reward for going along with the conspiracy, but he didn't get the medal and why he didn't get the medal or whether he was supposed to get the medal has nothing to do with whether we conspired because they all relate, each one of these propositions, to one question: Why didn't we go ahead in Iran?

That question, your Honor, the plaintiff has answered knowing of the dates that he was talking about, knowing of the report he was talking about. The documents give the answer, the depositions give the answer and plaintiff has finally been forced to give the answer because he said when Mr. Jones knew of those conclusions, he was not a conspirator.

The conclusions were exactly what every witness testified has been Cities Service's attitude and opinion all along. Iran would first have to settle with the Anglo-Iranian Oil Company. Iran would first have to get their cooperation in order to get markets and tankers and then, if ever, Cities Service would be prepared to assist.

Now, I say to your Honor that is the end of the case and [fol. 12079] I say that when Mr. Waldron acknowledged that in 1955 we were complaining that we had been excluded, he put the capstone on his case and he can't go back and rewrite the beginning. He has alleged a consistent course of conduct on the part of Cities Service. The documents show there is no turnabout, there is no change and the documents say the very simple story that even plaintiff was forced to admit that there was no conspiracy by Cities Service.

I suggest to your Honor that the issue now before the Court, putting aside the many issues that have been before us before, is a simple one: Can a defendant be subjected to a multi-million dollar lawsuit to satisfy plaintiff's curiosity as to whether he had some kind of a claim against that defendant? Can he get out and sue J. P. Morgan &

Company, which is a good solvent debtor, and say "You conspired against me" and then examine J. P. Morgan & Company and everyone to whom J. P. Morgan & Company talked on the theory that maybe by asking other people what Morgan said, he will find some shred of evidence that there was an agreement to hurt him.

I say to your Honor that is not the law; that one does not get that privilege by filing a complaint and that when a complaint contains merely that, the unsupported conclu-
[fol. 12080] sion, Rule 56 says throw it out of court. I submit, your Honor, this is a lemon and as a lemon as far as Cities Service is concerned, it has been squeezed dry. It has been almost five years of litigation on what started off a simple question of Kuwait and consortium and ended up encompassing every suspicion and every speculation a fertile mind could come up with. The papers are on this desk. There are 2,500 pages of transcript, over 200 documents, dozens of briefs, dozens of affidavits and I say to your Honor it ends where it should have started with the plaintiff admitting that throughout the period concerning which he has examined, Cities Service wasn't conspiring with anyone. I suggest to your Honor all that remains is to ring down the curtain on this aspect of the case and I urge you with all my strength that now is the time to pull that cord.

[fol. 12081]

ARGUMENT BY MR. LANE

Mr. Lane: May it please the Court, I think if I may remind your Honor of a case that I know your Honor knows well and yet my whole argument, I would like to have this frame of reference of Pola against Columbia Broadcasting System.

Just briefly the facts in that case, which very largely parellel the facts in this case, were these:

The plaintiff, Pola, contended that he had created and built up in Milwaukee a most successful ultra high fidelity broadcasting station, and that Columbia Broadcasting Sys-

tem, the defendant, which had a contract with him, cancelable on six months notice, formulated a plan through the use of other persons to acquire the ultra high fidelity station in Milwaukee; have that other person take over the plan, and then as soon as the Federal Communications Commission authorized multiple ownership, take it over, cancel the contract with him, Pola, then drive him out of the business, and then fold up the ultra high fidelity broadcasting in Milwaukee, all with a view to protecting its heavy investment throughout the country in what are called very high frequency stations.

In that case the plaintiff Pola was permitted to examine [fol. 12082] everything he sought to examine; he was permitted to take the deposition both before and after CBS moved for summary judgment of any employee or officer or person alleged to have participated in the conspiracy and he exhausted all of the available evidence.

When summary judgment was granted against him the United States Supreme Court said that in such a complex anti-trust case, where of necessity the evidence was in the hands of the defendants, and where motive and intent were very much in issue, there was enough to have made the granting of that motion improvident.

Justice Harlan dissenting particularly emphasized that Pola had had the opportunity to see everything.

The reason assigned by CBS for canceling its contract with Pola's station was simply that it was exercising the normal right of a producer to select his outlets.

Counsel for CBS emphasized over and over that there is not a shred of evidence to show that this was anything other than a normal commercial decision.

[fol. 12083] The parallel between the two cases is precise.

Now contrast, if you will, the situation in which the plaintiff finds himself here. In the first place, when he started his action, as in every anti-trust conspiracy case, he was on the outside and it was impossible at the beginning for him to be precise. He is not, I submit, to be confined forever in this litigation to the surmises which he

made before he had the opportunity to inquire into any of the evidence at all, namely, the Kuwait and consortium aspects of the transaction.

When we came into court, before your Honor was put in charge of this case, the defendant to a man asserted that they did not know who Mr. Waldron was, and that they would be unable to answer the complaint until they had an opportunity to examine him.

The Court granted them permission to examine him and meanwhile stayed oral examination on Waldron's part.

After he had been examined for six days, it seemed to me that they knew all they needed to know about him, at least to answer the complaint so that we could get this case on the tracks in the normal process of an anti-trust [fol. 12084] case, and therefore moved to terminate the deposition of the plaintiff.

The motion was denied and opportunity was taken at that occasion to outline a series of further examinations running for another 260 days, meanwhile continuing to stay so that Mr. Waldron had no opportunity whatever to conduct examination on his own behalf.

Then Cities Service moved for summary judgment. In our brief in our position to Cities Service's motion, made I should point out before Cities Service or anybody else had served an answer to the complaint, we pointed out that one principal witness was already dead, Mr. Shaw, at Cities Service, and Jones and Watson and Lowe, who were the other principal officers who dealt with Waldron and Cities Service, were approaching retirement age.

On the argument when your Honor asked me what we wanted I said "The place to begin is with Jones." Your Honor granted an examination, but it was a limited examination, and it was framed as Cities Service asked the Court to frame it, permitting us to examine only Mr. George Hill, not Mr. Jones, who was the principal actor in the picture [fol. 12085] on behalf of Cities Service.

When your Honor did that you did it with perfect good conscience; you did it intending to do something construc-

tive; you did it intending to maintain a firm control of this action for a proper purpose. I think in retrospect at least I am permitted to say it was a mistake.

When your Honor announced that you were going to permit that examination you said that in the ordinary case examinations would be liberal but in this particular case it seemed to you that you should approach it with pragmatic caution. That you should look at it through the other end of the telescope and that instead of granting a broad examination and then permitting the defendant to come in for a protective order, you would start it the other way around, with a narrow examination and permit the plaintiff, if he could show cause, to apply for a broadening of the order.

I understand why your Honor did it, I salute you for having done what you thought was the proper thing to do, but I suggest most respectfully that it has been one of the greatest stumbling blocks to our proof in the case and that when you consider, as you must, what Mr. Costikyan has [fol. 12086] just said to you, you must at the same time recognize the handicaps under which we have labored to get more precise information in support of our claim.

We then proceeded with the examination of Mr. Hill, and while that was in progress, unfortunately for us, Mr. Jones was killed. His death took place on March 1, 1961.

In November, 1962, we came back to your Honor and asked for further discovery. Our motion was denied. So we went back to examine Mr. Hill further, and when that examination was concluded, we then came back to the Court again, this time it is in May, 1963, and we asked for examination of Watson, Frame and Heston.

Your Honor at that time indicated that we should submit something in the nature of an inventory of facts and circumstances which would allow inferences in support of plaintiff's claim as distinguished from mere conjecture and suspicion.

I have since to my regret learned that your Honor felt that the memorandum which we submitted in attempting

to comply with your Honor's request should have instead have been an affidavit, but nevertheless your Honor granted in June, 1964, at the time when the motion by the other [fol. 12087] defendants to dismiss the complaint was denied, an examination of Messrs. Watson, Frame and Heston.

Pursuant to an order, a copy of which I have in my hand, which said that the examination shall be limited to certain subjects, and then provided that the defendant Cities Service Company should produce to plaintiff ten days in advance of said examination, copies of all documents not heretofore produced to plaintiff in the possession or control of the defendant Cities Service Company, which relate to the subjects upon which the defendant Cities Service Company is to be examined.

When we held that examination Cities very carefully produced only those papers which came within the narrowest possible interpretation of your Honor's order. For example, Cities Service would produce, if there was such a thing, a document which constituted a communication between the deponent and another Cities Service employee. But if there was a document which referred to that communication but was not itself that communication, it was not produced to us.

So that rather than produce the documents which re- [fol. 12088] lated to the subjects upon which the examination was being conducted, Cities would only produce the documents which were in fact the communications.

This meant, for example, that we couldn't get any of the Jones papers. One thing which the examination made very clear is that the witnesses—I should say did not—would not —the fact is they did not testify on anything of substance which was not within the four corners of the document produced and it made this case more than ever before what we must all recognize today it is, namely, a complex paper case. No paper, no testimony; no paper, no reliable testimony.

At this point in our efforts to find out what Cities Service did and why Cities Service did what it did and refrained from doing what it refrained from doing, we are not only on the outside, as normally in an anti-trust case, but Mr. Jones, the principal actor, is dead. He died while shielded by the Court on the application of his lawyers, and then when the Court granted us limited discovery, Jones' lawyers withheld all of Jones' papers. Not only is Mr. Jones dead, Mr. Whetsel is dead.

Whetsel was the expert in foreign production of the [fol. 12089] Cities Service Company. He went with Mr. Jones to Iran, Whetsel was at the dinner at the Country Club with Waldron and Nelson and Lowe just before Waldron and Nelson went to Iran to get the invitation.

Lowe also is dead. Lowe was one of the top officers who was most involved in the transaction between Waldron and Cities Service Company. So that from every side it is indicated to the Court that the papers are the things which will explain what happened and why it happened, and we learned in the course of this most recent deposition, series of depositions, that an Iranian Room had been set up at the Cities Service Company to accumulate these papers.

We knew also and had suggested to the Court when we applied for this examination that right after the suit was instituted Mr. Watson sent out a memorandum to various participants and asked them to report to him on Mr. Jones' trip to Iran in 1952, and to get their papers together.

I remember now as I stand here that when that subject came up before your Honor, your Honor asked whether or not that kind of material didn't represent the work [fol. 12090] product of the lawyer. I think you will recall it. You were, of course, thinking of Hickman against Taylor. As I recall Hickman against Taylor and cases subsequent to it, although it may have had some feature of work product of the lawyer, where the witness is unavailable to the attorney for the other side, then an exception to the Hickman against Taylor rule indicated.

Your Honor I think will recall that in Hickman against Taylor, which involved the loss of life of some seaman who

went down on a tug in Philadelphia, that one of the arguments made was that his opponent, who was attorney for the plaintiff, could also have interviewed the survivors.

In this case we couldn't interview Mr. Jones, we couldn't interview Mr. Lowe, we couldn't interview Mr. Whetsel, and not only because they would have been unwilling to be interviewed, but we couldn't compel them to give us the information, because although they were alive at the time, we were stayed from doing any such thing.

So it seems to me, your Honor, that today when you consider how much we have been able to gather together in the face of these handicaps, that it ill behooves Cities Serv- [fol. 12091] ice counsel to say that we haven't shown enough when, as they very well know, the files of these important witnesses, Jones, Whetsel, Watson and Lowe, are gathered in this Iranian Room, and that if they were shown to us, then we might be satisfied that we are mistaken in our pursuit of their client.

It strikes me that when one protests that they are innocent and when one protests that they are being harassed, when there is an answer so simple, which is simply to show us those papers, their protests should fall on deaf ears.

Now, taking these handicaps, what have we shown so far? What is our inventory? It is augmented since we made it last time, and this time, at your Honor's request, I have tried to put it in the form of an affidavit, which this time I hope you will recognize makes a very conscientious effort to comply with your Honor's request. It shows in brief that the Cities Service Company had never had a source of oil in the Middle East. It had wanted it, it had negotiated for it with the Gulf Oil Company in 1948 and again in 1950 or 1951. And that when Waldron approached the Cities Service Company in 1952 with the proposal to sell oil under his contract, Cities was quick to take advan- [fol. 12092] tage of that opportunity to get for itself an invitation from Premier Mossadegh, with a view to taking over the whole Iranian oil industry.

One of the new items on the inventory is, of course, Mr. Watson's memorandum marked "Secret Draft Secret," in which he lays out for Mr. Jones a scheme for the acquisition and control of the Iranian Oil industry through the leadership of the Cities Service Company of a consortium of independent companies, none of whom up to that time had any interest to protect in the Middle East.

The plan is quite plain, it is that one of the predicates for it is that Iran will never be able to go back in harness with the Anglo-Iranian Oil Company; another predicate is that the American majors who already have interests to protect in the Middle East will make common cause with Anglo-Iranian and therefore Cities Service should work through independent American companies and the thesis of it is that Cities Service can provide the management and the technical know-how to rehabilitate the Iranian oil industry and get Iranian oil flowing again to world markets.

I have said nothing about tankers. I don't remember, [fol. 12093] as I address the Court, whether tankers were covered in that draft marked "Secret," but it was very much on Mr. Jones' mind and when he went to Iran he stopped off in Holland on the way and telephoned to Mr. Watson to find out what Cities Service experience had been in recent years with getting tankers into the Middle East and how much Cities Service could count on handling within a reasonably short time.

This initial plan which was outlined by Mr. Watson in the secret draft is modified and elaborated but not changed in substance when you follow the various memoranda written by Jones and Frame and Heston for Prime Minister Mossadegh down to, as I recall it, October, 1952.

Of course, when Mr. Watson got up his first draft he wasn't master of the facts. Additional facts were gathered together about tankers, for, as I have indicated, when Mr. Jones was in Holland and the further facts with respect to the physical facilities, the fields, the pipelines, the docks, and the refineries in Iran were gathered while Jones and his party were in Iran.

With all of those facts Mr. Jones apparently concluded that there were two ways to reactivate the Iranian oil in-
[fol. 12094] dustry. In both of those plans Cities Service played the leading part. The way which would have been, you might say, most dramatic in which oil would have started flowing most quickly contemplated that a mixed claims commission would be set up under Mr. Jones' chairman to settle the mutual claims between the National Iranian Oil Company and the Anglo-Iranian Oil Company.

And that then Cities Service, not called so by name but described as the American company, would reactivate the industry and sell oil to the British who would transport it to the Eastern Hemisphere markets, which they controlled, and in that means acquire compensation for their properties which have been taken over by the Iranian Government. That was the big plan.

The smaller, more conservative plan, was in the event that no agreement could be reached compromising the claims, no cooperation could be secured with the Anglo-Iranian Oil Company, and in that event an American company, again the Cities Service Company, would assist herein to start introducing its oil again in world markets on a more modest scale.

[fol. 12095] And the prediction was that in a very short time, as much as twenty percent of the then production of a million barrels a day could be absorbed in the United States.

In his argument Mr. Costikyan said that the key fact here is that Cities Service concluded that they could not go on without Anglo-Iranian cooperation.

I have tried to indicate, and I think the papers fully support my statement, that that is not the fact; that the alternative plan was to reactivate the Iranian oil industry the way that Mexico had done, selling less oil, but at the same time, of course, taking all of the price, so that the sale of less oil would mean more financially to the seller in Iran than the larger quantities which could be sold by cooperating with the Anglo-Iranian Oil Company.

Now, it has been said several times to this Court, twice when I have not been here, perhaps once when I was here, but, quite frankly, I don't recall it ever having been said in my presence, but I know it has been said twice in my absence, and it is said flatly in the papers which reassert the pending motion for summary judgment, that to have signed [fol. 12096] the complaint in this case was an irresponsible act.

Since I am the one who signed that complaint. I am the one who is accused of these irresponsible acts.

I do not reciprocate with accusation of irresponsibility on my opponent's part, but I do state that I think my opponent has been grossly misinformed.

Your Honor may recall that when we first argued this motion in May of 1960, there was some talk about Mr. Jones having gone to Kuwait while he was in Iran, and maybe I can bring it back to your mind if I would remind you that the Court said:

"Of Kuwait, it had been written up in Fortune Magazine. It sounds like a paradox."

Then my opponent said: "It is true that Mr. Jones was invited to go to Kuwait, buf he never got there."

The Court said: "Is that on the record?"

My opponent: "I don't know whether it is or not, but, if necessary, I will put in a supplemental affidavit to cover that. It never occurred to me that anybody would claim that he had."

[fol. 12097] My opponent was grossly misinformed. Apparently he was told that Mr. Jones was invited to go to Kuwait, but he wasn't told that Mr. Jones had in fact gone to Kuwait.

In fact, he must have been told, or he wouldn't have made any such statement, that Mr. Jones did not go to Kuwait.

In our recent deposition of Messrs. Watson, Frame and Heston, we have positive proof that Mr. Jones went to Kuwait, and that statement which I have referred to from the prior argument was conceded by plaintiff's counsel in

briefs submitted in support of this motion, and I venture to say that although counsel was ignorant of the falsity of the statement, their client must have read the brief and must have been aware of the falsity of the statement.

Now, I emphasize this because I don't think that my opponents know what is in that. I think it is from their point of view something that they better not know about, but I think from the point of view of justice and fair play that in such a case as this the plaintiffs should have access to those papers, and that to give the plaintiffs access to those papers would bring a very short and unharassing termination of the present controversy between the plaintiffs [fol. 12098] and Cities Service, either by the granting or denial of Cities' motion for summary judgment, and that until we see those papers, it is entirely premature to do anything of the kind, that is to say, to grant the motion for summary judgment.

Now, my predicate, your Honor, is that ample has been shown from these depositions with respect to Cities interest in Iranian oil and with respect to how Cities is protecting that interest, to deny Cities' motion for summary judgment and, of course, if Cities motion is denied, then the plaintiffs' motion for discovery under 56-F becomes academic.

We haven't spoken of plaintiffs' cross-motion for discovery. I have only spoken of it in connection with the frame of reference to emphasize how limited the plaintiffs' opportunity has been to get the facts which plaintiff is sure exists.

So if I may reserve my right to speak very briefly on the other motion, this concludes all that I have to say on the subject of the Cities Service motion for summary judgment.

I have a supplemental memorandum which we prepared today in opposition to the supplemental memorandum of [fol. 12099] Cities Service which I would like to serve, with the permission of the Court, and submit.

I was in some dilemma, I must confess, as to just what the procedure would be today, because when my client died

all further activity in the case was stayed, except for the application which might be made on behalf of the estate, and it did not seem to me that we were in a position to serve any papers until we had been re-admitted to the action on behalf of the Executrix.

The Court: Do you have that supplemental memorandum?

Mr. Lane: Yes, I do, Judge.

The Court: You may submit it now.

(Paper handed to the Court.)

The Court: I don't think it is necessary to hear any further argument this afternoon on any of the matters before me.

Is there anyone else who wishes to be heard on any phase of these matters?

ARGUMENT BY MR. DEAN

Mr. Dean: Well, your Honor, you may not want to hear me at this time, but I would merely like to point out that whether your Honor grants or denies the Cities Service [fol. 12100] motion, the plaintiffs' motion against the other defendants is only made in connection with their application that the Cities Service motion not be granted, and I think that the record is completely absent of any indication whatsoever that there ever was any conversation between Mr. Jones and any of the other defendants.

I think that before there can be any examination of any of the other defendants, that they would have to show relevancy, and they would have to show need, and they would have to show scope, and I would submit that they have not sustained the burden of proof in any of those respects.

They relied for their need to examine the other defendants on a single document, which is Cities Service 124 for identification, the letter of December, 1952, that in its alleged effort to do everything to help Iran solve its problems that Jones has had conferences—and I quote—"with members of the outgoing and incoming governments".

And then there is some deletion.

Also, "extended conference with oil executives, publishers, members of the press and newspaper people."

But it is quite obvious that he was, or at least that he [fol. 12101] thought that he was acting against both Anglo-Iranian and any of the defendants who had other interests in the Middle East.

So there isn't anything in the record to indicate that at any time Mr. Jones, or anyone else from Cities Service, ever had any conversations with any of the executives from the other oil companies.

So I would submit that there has been no demonstration, in accordance with the rules, of either relevance or need or scope, of any need for any discovery of any of the other defendants.

So with respect to time and scope, the plaintiffs' application covers the period from June, 1952, which is, according to their allegation, the first time the Waldron group got in touch with anyone from Cities Service, through January, 1955, which by their own, plaintiffs' own admissions, is some eighteen months after their alleged contract by its very terms had expired, and plaintiff hasn't limited the period or requested discovery to any date which would be appropriate to any specific issue which the plaintiff might attempt to justify in this proceeding, so it seems to me that the plaintiff has completely failed to sustain any burden of proof [fol. 12102] for discovery against the other defendants.

There is one other matter also which I am sure your Honor has in mind, and that is, depending upon the outcome of this Cities Service's motion and the plaintiffs' cross-motion, fixing of the time for the other defendants to answer.

I don't know when your Honor wants to hear us on that point, but that ought to be taken up at some time.

Thank you, your Honor.

The Court: Well, I think that rather promptly after the decision of the matters heard this afternoon, some spokesman for the defense should activate the Court and counsel for the fixing of a time to have these other matters taken up.

Mr. Dean: Thank you, Your Honor.

Mr. Lane: Your Honor, we have already stipulated on the time for the answers, and I don't know what other matters there may be, but nevertheless we have been in litigation so long—

The Court: My remark is in the nature of an omnibus catch-all reference. Anything that is pending that has to be taken up will be taken up when I dispose of these motions.

[fol. 12103] Mr. Lane: Of course, your Honor.

The Court: I didn't want to limit the agenda.

Mr. Lane: Of course.

Mr. Costikyan: Your Honor, I don't want to press, but I want to be sure that I did understand.

Is it your Honor's view that you prefer not to hear any rebuttal from me?

The Court: I don't think it is necessary.

Mr. Costikyan: All right, your Honor.

There is only one thing I would like to say—

The Court: I saw you stand up before, and you probably will go away feeling that there is something that I ought to know, so you may as well get it off your chest.

Mr. Costikyan: May I get this off, your Honor? Mr. Lane has made reference to a representation that was made by my senior partner some years ago in the proceeding.

The Court: I remember.

Mr. Costikyan: And I am responsible for it, your Honor, but I will only plead this as justification. The source of my information was Mr. Waldron in his deposition, who [fol. 12104] said, "I don't believe he went to Kuwait."

The Court: The matter has been resurrected a number of times, and I don't blame Mr. Lane for resurrecting it

again. It is good advocacy. I don't think he should be criticised for it. On the contrary, it is a legitimate argument. How weighty it is is another story.

Now, is there anything else that you think I ought to know?

Mr. Costikyan: No, your Honor. I will forego for a while.

The Court: Do you feel that your specific points have been answered by Mr. Lane?

Mr. Costikyan: No, your Honor. I am still waiting to hear what the material proposition of facts which plaintiff asserts is contravened by us and requires any further examination.

The Court: Well, now, do you feel there is anything Mr. Lane has said which requires any amplification by way of the record, or do you intend to rest?

Mr. Costikyan: I would like your Honor to know that in our affidavit we deal with the question of the scope of [fol. 12105] document production.

The Court: In the past or future?

Mr. Costikyan: On this limited thing about whether or not Mr. Jones' files were produced.

Of course they were, your Honor, to the extent that they were relevant to the scope of the examination that you had directed.

I think that is all covered in my papers.

The Court: All right.

Mr. Lane, is there anything that Mr. Costikyan said this afternoon that you think should be covered by you in writing, or are you content to rest on the record?

Mr. Lane: I am content, your Honor, to rest on the record.

The Court: Very well, sir.

Then the Court will reserve decision on all of the motions that were argued.

Mr. Lane: Thank you.

The Court: Thank you, gentlemen.

[fol. 462a]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 376—September Term, 1965.

Argued May 13, 1966

Docket No. 30144

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PATRICIA WALDRON, as executrix of the last will and testament of GERALD B. WALDRON, deceased, Plaintiff-Appellant,

v.

CITIES SERVICE Co., Defendant-Appellee.

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Before: Waterman, Anderson and Feinberg, Circuit Judges.

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Appeal from summary judgment in favor of defendant in the United States District Court for the Southern District of New York, William B. Herlands, *Judge*. Affirmed.

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Samuel M. Lane, Esq., New York, N. Y. (Alan R. Wentzel, Esq., and Casey, Lane & Mittendorf, New York, N. Y., on the brief), for Plaintiff-Appellant.

[fol. 463a] Simon H. Rifkind, Esq., New York, N. Y. (Edward N. Costikyan, Esq., Leonard M. Marks, Esq., and Paul, Weiss, Rifkind, Wharton & Garrison, New York, N. Y., on the brief), for Defendant-Appellee.

OPINION—June 6, 1966

ANDERSON, Circuit Judge:

This is an appeal from a final order of the District Court for the Southern District of New York granting a motion for summary judgment made by the defendant Cities Service Co. and denying the plaintiff Waldron's[1] motion under F. R. Civ. P. 56(b) for further discovery. Cities Service was one of seven major oil companies named as defendants in this treble damages action brought on June 11, 1956 pursuant to §4 of the Clayton Act, 15 U. S. C. §15 (1964 ed.). Stated in general terms, the suit concerns plaintiff's claim that, because of the conspiracy of Cities Service and the other defendants, he was prevented from exploiting his contract for the importation and sale of Iranian oil. The rather involved facts will not be recited here as they have been stated fully and with great care by Judge Herlands in two reported opinions. See, *Waldron* v. *British Petroleum Co.*, 231 F. Supp. 72 (S. D. N. Y. 1964) and *Waldron* v. *British Petroleum Co.*, 38 F. R. D. 170 (S. D. N. Y. 1965) (the decision here appealed from).

We have no question that the order below is appealable. Cities Service was the only party moving for summary judgment, and the court, in conformity with F. R. Civ. P. 54(b), entered an order dismissing the complaint against [fol. 464a] it. Thus the order is in every sense a final disposition of the suit against Cities Service and is appealable. 28 U. S. C. §1291 (1964 ed.); and there is no reason why this appeal should be withheld during the pendency of the suits against the six remaining defendants, which may not be fully disposed of for several years.

Turning to the merits, we are convinced that as the record now stands the grant of summary judgment to the defendant was proper. After nine years in the district

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[1] Plaintiff died after the suit was commenced and his widow as executrix has been substituted as plaintiff. For convenience we refer to plaintiff as if the decedent were still alive.

court it is plain that the plaintiff has not established the existence of any "genuine issue as to any material fact." F. R. Civ. P. 56(c); see, F. R. Civ. P. 56(e). Indeed, the record is barren of any facts which would support the existence of a claim against Cities Service. *Dressler* v. *MV Sandpiper,* 331 F. 2d 130 (2d Cir. 1964).

While Judge Herlands did restrict the scope of discovery we do not think that he abused his discretion. At various times during this litigation the plaintiff advanced several divergent theories of his case by which he sought to link Cities Service to the alleged conspiracy. First it was his theory that Cities Service was "rewarded" by the others for breaking off negotiations with him concerning Iranian oil. The rewards were said to have been a favorable long term contract for the supply of Kuwait crude oil, and a participation share in the Iranian Oil Consortium. Later plaintiff abondoned that theory and adopted the hypothesis that evidence of a sudden loss of interest by Cities Service in Iranian oil during the later months of 1952 proved that Cities Service had joined with the alleged conspirators. Still later, after having discarded that theory, the plaintiff based his action on the claim that Cities Service interfered with his attempts to sell Iranian oil to the Richfield Oil Company.

[fol. 465a] Following extensive discovery by Waldron under the Kuwait and Consortium theories, Cities Service first moved for summary judgment on April 8, 1960, but the trial court adjourned the motion and granted Waldron further limited discovery. Plaintiff examined Cities Service's employee who had been in charge of the Kuwait and Consortium transactions. After this additional discovery had been completed Cities Service renewed its motion on May 13, 1963. The complaint was then amended to drop the specific Kuwait and Consortium charges and the plaintiff proceeded instead upon a more general allegation of conspiracy. The court again adjourned decision on the motion to permit still further discovery through the examination of several principal officers of Cities Service in

order that plaintiff might have an opportunity to look for some support for his "loss of interest" theory. This included discovery of a good deal of additional correspondence. Discovery was also permitted relative to sales of Iranian oil to the Richfield Oil Company. On October 16, 1964 Cities Service again renewed its motion, and the court finally granted summary judgment in September, 1965. Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. The court quite properly denied the Rule 54(f) motion for further discovery by which plaintiff sought to engage in still another "fishing expedition" in the hope that he could come up with some tenable cause of action.

We are not unmindful that private anti-trust suits to some extent cast the plaintiff in the role of a "private attorney general" and that such suits are favored, see, e.g., *Lawlor* v. *National Screen Service Corp.*, 349 U. S. 322, 329 [fol. 466a] (1955); cf., *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432-433 (1964). Even so, it is apparent in this case that Waldron was given ample opportunity and scope in his shifting programs of discovery. The plaintiff, as a "private attorney general," may not seek indefinitely, within the period of limitations, to use the process to find evidence in support of a mere "hunch" or "suspicion" of a cause of action.

The judgment of the District Court is affirmed.

[fol. 467a]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Robert P. Anderson, Hon. Wilfred Feinberg, Circuit Judges.

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PATRICIA WALDRON, as Executrix of the Last Will and Testament of GERALD B. WALDRON, deceased, Plaintiff-Appellant,

v.

BRITISH PETROLEUM CO. LTD., et al., Defendants,
CITIES SERVICE CO., Defendant-Appellee.

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JUDGMENT—June 6, 1966

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. Daniel Fusaro, Clerk.

[fol. 468a] [File endorsement omitted]

[fol. 469a] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 470a]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1966

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PATRICIA WALDRON, etc., Petitioner,

vs.

CITIES SERVICE CO.

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ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—August 29, 1966

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 3, 1966.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 29th day of August, 1966.

[fol. 471a]

SUPREME COURT OF THE UNITED STATES

No. 744, October Term, 1966

PATRICIA WALDRON, etc., Petitioner,

v.

CITIES SERVICE CO.

ORDER ALLOWING CERTIORARI—January 16, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.